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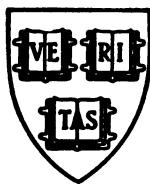
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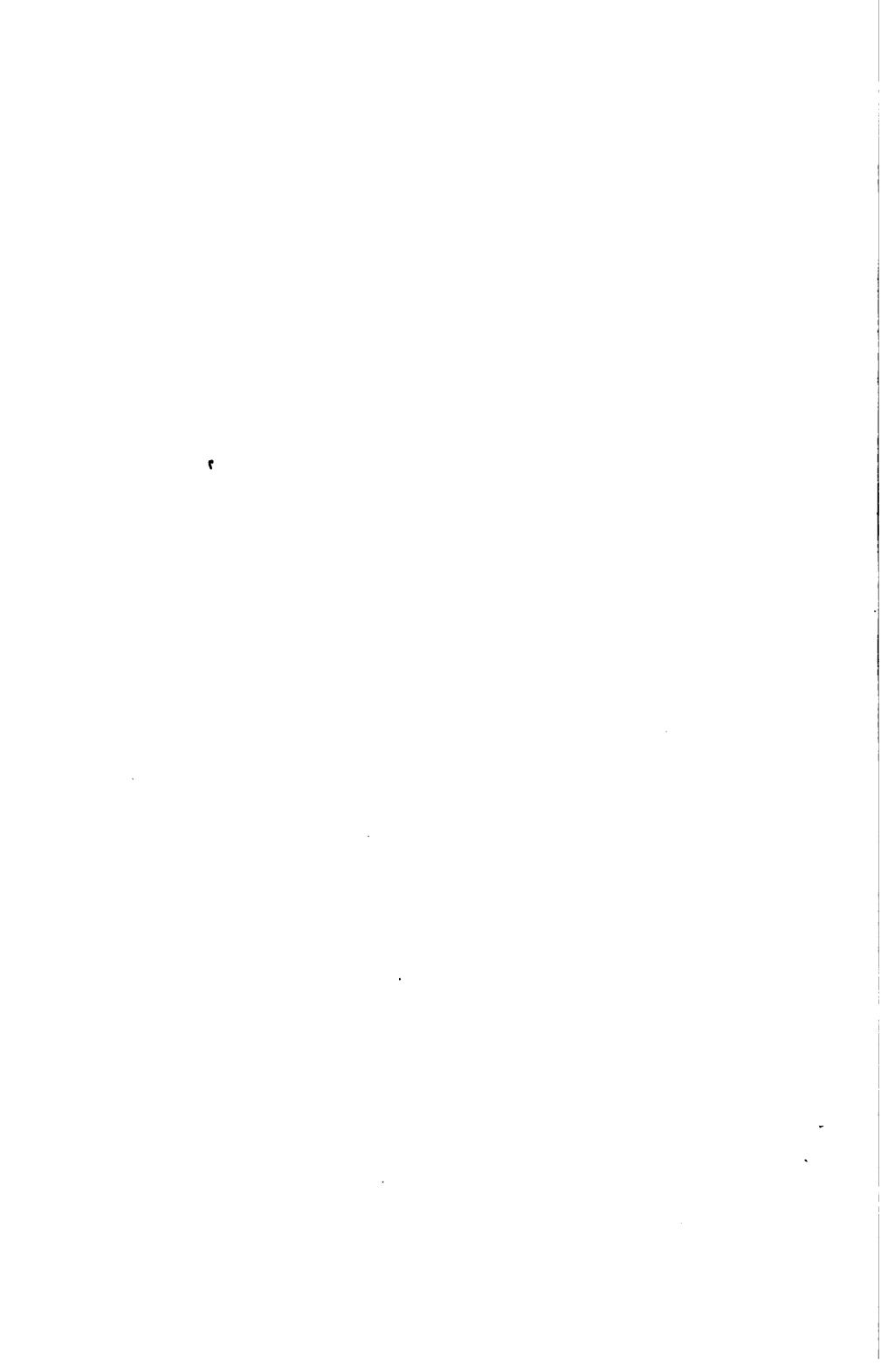


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Canada. Laws, statutes, etc. Bankruptcy and

THE

# INSOLVENT ACT OF 1875:

WITH THE

Ivan J. MacKellar

## RULES OF PRACTICE

et

AND

## TARIFFS OF FEES

IN FORCE IN THE DIFFERENT PROVINCES OF THE DOMINION.

ANNOTATED BY

IVAN WOTHERSPOON, ADVOCATE, M.A., LL.B.,

WITH AN

## INDEX AND LIST OF CASES,

BY C. H. STEPHENS, B.C.L., STUDENT-AT-LAW

6

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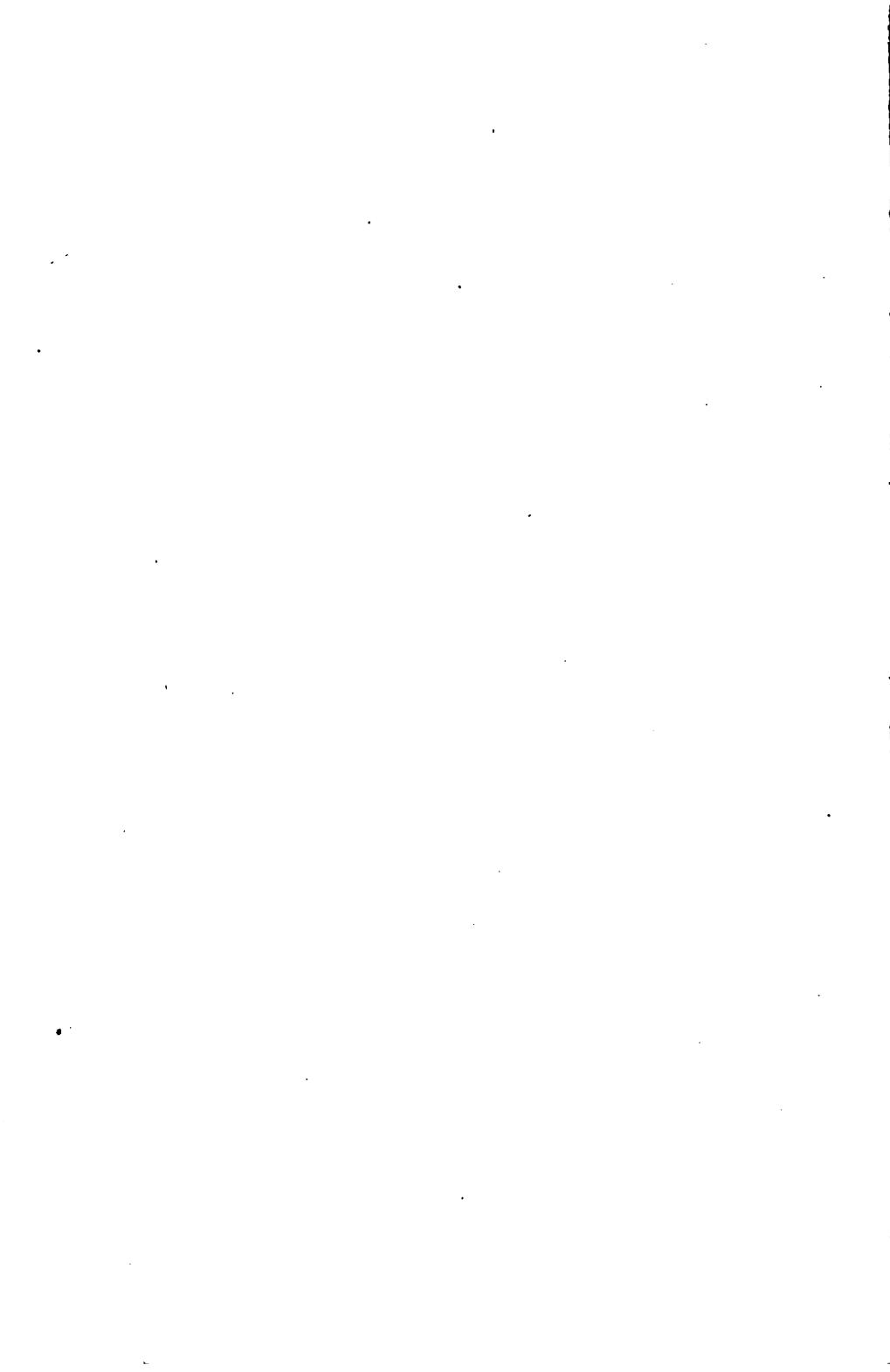
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TO THE  
HONORABLE JOHN J. C. ABBOTT, Q.C., D.C.L.,  
DEAN OF THE FACULTY OF LAW OF M'GILL UNIVERSITY,

THIS WORK  
IS  
*Affectionately Dedicated.*  
IN ADMIRATION OF HIS ABILITIES AS A COMMERCIAL LAWYER,  
AND WITH SINCERE THANKS  
FOR THE ENCOURAGEMENT AND ASSISTANCE WHICH HE HAS  
SO GENEROUSLY GIVEN TO THE AUTHOR.



## PREFACE.

---

In all commercial countries one of the most difficult problems to be solved by legislation has been the settlement of the relations between a creditor and his bankrupt debtor, in such a manner as to give to the former as much power as possible over the estate of the latter, without unduly harassing the honest debtor. The difficulty of attaining this aim has been felt in Canada as elsewhere.

In the words of a recent article in a standard English paper: "Bankruptcy legislation is always in a bad way. " We are afraid there is no possible mode of inducing "people who have rashly given credit to be contented with "their fate. They will grumble like a man under the lash, "whom, hit high or low, there is no pleasing." And the same thing may be said of insolvency legislation in this country.

It is not necessary here to treat of the introduction of a special bankruptcy legislation into Canada, through the "Ordinances" in the Province of Quebec, and the special statutes in the other provinces. It will be sufficient to mention that the Insolvent Act passed in 1864 made a complete change in the law then existing. That statute may be considered the foundation of the present Act, and of the Act of 1869, both of which were modeled upon it, with varia-

tions of detail which have been introduced from time to time.

These Acts have met with a great deal of abuse; but yet the Legislature of the Dominion, after serious consideration, and reports from the different Boards of Trade throughout the country, have concluded to continue to apply the same principles, with one marked modification, namely, the abrogation of the power of voluntary assignments. This is the greatest change effected by the present Act. A lesser modification is its extension to joint stock companies. This was necessary in view of the large and daily increasing share of the trade and manufactures of the country, conducted by incorporated Companies.

An important change is also made in reference to the Province of Quebec, by an attempted abrogation of the law of that Province, which gives to the unpaid vendor the privilege of taking back his goods, or obtaining at least a lien upon their proceeds, provided the goods be in the same condition as when sold, and that the privilege be exercised within fifteen days of their sale. The constitutionality, however, of this enactment is doubtful, as it seems a direct interference with the civil law of the province, and not a positive and necessary outflowing of any enactment of insolvency, and therefore opposed to the principle of the Confederation Act.

The editor regrets to have to point to one serious defect in the present Statute—viz, the carelessness of its grammatical construction. Instances of this are pointed out in the notes to the sections. We might refer specially to the fourth section, which treats of the “demand of Assignment.” There is great ambiguity and obscurity

in the final clause of this section, so much so, that it is difficult to determine what is meant. To what word does the adjective "original" apply, and what is the "notice" referred to? One interpretation has been given in the notes to that section; but since that portion of the work has passed through the press, the Editor has taken another view of its meaning, which perhaps is the correct one. It is, that the clause should be read as containing the word "affidavit" after "original" and having the word "demand" substituted for "notice" in the last line. Another obscurity is to be found in the 14th section which says that "a debtor against whom a writ of attachment has issued, as provided by this Act, may make an assignment of his estate, &c." Now it is clear that after an attachment has been effected under such a writ, the debtor cannot assign, for he has nothing left. His estate is already vested in the assignee to whom the writ in his case is addressed, and in places where, as in Montreal, there are several assignees, this section might lead to useless litigation.

It might have been well, too, had ampler definitions been given of the powers and duties of the official assignees when concurrent writs are issued.

One improvement upon previous legislation will be observed in the increased stringency of the provisions respecting composition and discharge. The effort which has been thus made in this direction will, no doubt, by a proper application on the part of the courts, remove the reproach which has been so freely cast upon the laws hitherto in force, that they were nothing more than "a new way to pay old debts."

It is to be feared, however, that sufficient provision has not been made for the working of the Act. In the large com-

mercial centres, at least, the appointment of a special commissioner and clerk in bankruptcy is required, and until some such provision is made, much embarrassment and delay is likely to occur.

On the whole, however, the Act is an advance upon previous legislation on the subject, and will probably meet with the approval of the commercial class, and tend to the encouragement of sound principles in trade. In a question of so much difficulty, perfection in legislation can only be approximate.

## LIST OF ABBREVIATIONS.

### A.

- Abbott ..... Abbott's Insolvent Act of 1864.  
Ad. & E. .... Adolphus & Ellis, Reports.  
Amb. .... Ambler, Reports, Chancery.  
Arch. .... Archbold, Law & Practice of Bankruptcy.  
Atk. .... Atkyns, Chancery Reports.  
Av. & Hobbs ..... Avery & Hobbs, Bankrupt Law United States

### B.

- Ba. & Be. or Ball & B. Ball & Beatty, Reports, Chancery.  
Bank & Ins. Rep. .... Bankruptcy & Insolvency Reports.  
B. & A. .... Barnwell & Alderson, Reports, K. B.  
B. & C. .... " & Creswell " "  
Bed ..... Bedarrire, Droit des Faillites.  
Bing ..... Bingham, Reports, C. P.  
Benj. Sales ..... Benjamin on Sales of Personal Property.  
Blackstone R. K. B.. Blackstone, Reports, K. B.  
Bligh ..... Bligh, Chy. Reports.  
B. & P ..... Bosanquet & Puller, Reports, C. P.  
Brod. & B ..... Broderip & Bingham, Reports, C. P.  
B. C. C. .... Brown's Chancery Cases.  
B. R ..... Bankruptcy Reports.  
Boul. Paty ..... Boulay Paty. des Fallites.  
Buck ..... Buck, Bankruptcy Reports.  
Bumps ..... Insolvent Laws of the United States.  
Burr ..... Burrows, Reports, K. B.

### C.

- Camp ..... Campbell, Reports, N. P.  
Car. & M. .... Carrington & Marshman, Reports, N. P.  
Car. & P. or C. & P.. " & Payne, " "  
Carré ..... Carré Organization Judiciare.  
C. B ..... Common Bench Reports, Manning, Grange & Scott.  
C. C. Chron ..... Chancery Cases Chronicle.  
Chardon ..... Chardon du Dol et de la Fraude.  
Chy. Chr. Rep. .... Chancery Chambers, Reports.  
C. C. P. .... Code of Civil Procedure, Quebec.  
C. C. Q. .... Civil Code Quebec.  
Cod. de Com ..... Le Code de Commerce.  
Com. Dig. .... Comyn's Digest.  
Con. Stat. .... Consolidated Statutes.

X.

- Cooke, B. L. .... Cooke, Bankruptcy Laws.  
Cout. de P. .... Coutume de Paris.  
Cowp. .... Cowper, Reports, K. B.  
C. P. U. C. .... Common Pleas Reports, U. C.  
D.  
Dea. .... Deacon, Reports, Bankruptcy.  
D. & C. .... " & Chitty, Reports, Bankruptcy.  
De G. .... De Gex, Reports.  
De G., F. & J. .... De Gex, Fisher & Jones, Reports, Chancery.  
De G., M. & G. .... " Macnaghten & Gordon, "  
De G. & S. .... " & Smale, " "  
D. & M. .... Doria & Macrae on Bankruptcy.  
Doug. .... Douglas, Reports, K. B.  
Dow. & L. .... Dowling & Lowndes, Reports, Q. B.  
D. & R. .... " & Ryland " K. B.  
E.  
East. .... East, Reports, K. B.  
Edgar. .... Edgar, Insolvent Acts of 1864 and 1869.  
Edens B. L. .... Edens Bankruptcy Law.  
El. & Bl. .... Ellis & Blackburn, Reports, Q. B.  
Esp. .... Espinasse, Reports, N. P.  
Ex., Ex. Rep. or Exch Rep. Exchequer Reports.  
F.  
Fonbl. Rep. .... Fonblanche, Reports.  
F. & F. .... Foster & Finlason, Reports, N. P.  
G.  
G. & J. .... Glyn & Jameson, Reports, Bankruptcy.  
Grant. .... Grant, Reports, Chy.  
Green. .... Green, Reports, U. S.  
H.  
Holt. .... Holt, Reports, K. B.  
H. & C. .... Hurlstone & Coltman, Reports, Exchequer.  
J.  
James. .... James on the Bankrupt Law of the U. S.  
J. & H. .... Johnston & Hemmings, Chy. Reports.  
Jousse. .... Jousse, Nouveau Commentaire sur l'Ordinance  
de Commerce.  
Jur. .... Jurist, Reports in all the Courts.  
K.  
Kerr Fraud. .... Kerr on the Law of Fraud and Mistake.  
Kin. Bank. .... Kinnear, Law of Bankruptcy in Scotland.  
L.  
Lees. .... Lees on Bankruptcy (1874).  
L. C. L. J. .... Lower Canada Law Journal.

L. C. J.....	Lower Canada Jurist.
L. C. R.....	Lower Canada Reports.
Leveque, F.....	Leveque, Faillites et Banqueroutes.
L. & E.....	English Law & Equity Reports, Boston ed.
L. J.....	Law Journal in all the Courts.
L. J. (N. S.).....	" " (New Series).
L. J. U. C.....	" " of Upper Canada.
L. R. Chy.....	Law Reports, Chancery Appeals.
L. R. Eq.....	" " Equity.
L. R. Ex.....	" " Exchequer.
L. R. Q. B.....	" " Queen's Bench.
L. R. C. P.....	" " Common Pleas.
L. T. Rep.....	" Times, Reports.
L. T. (N.S.).....	" " " (New Series).
Lord Ray. Rep.....	Lord Raymond, Reports.

## M.

Madd.....	Maddock, Reports, Chancery.
M. C.....	Magistrate's Cases.
Mann. Ind.....	Manning's Index.
M. & S.....	Maule & Selwyn, Reports, K. B.
Moll.....	Molloy, Reports, Chancery.
Mon.....	Montagu, Reports, Bankruptcy.
Mon. & A. or M. & A.	" & Ayrton, Reports Bankruptcy.
M. & C.....	" & Chitty, " "
M. D. & De G.....	" Deacon & De Gex, " "
M. & McA.....	" & McArthur, " "
Moo. & M.....	Moody & Malkins, Reports, N. P.
Moore.....	Moore, Reports, K. B.
M. & Sc .....	" & Scott, Reports, C. P. & Ex.

## N.

Nam. Drt. Com.....	Namur Cours de Droit Commercial.
Nev. & M.....	Neville & Manning, Reports.
Nouv. Den.....	Denizart Collection de Décisions Nouvelles
N. P.....	Nisi Prius.
N. S.....	New Series.

## P.

Pard. Drt. Com.....	Pardessus, Droit Commercial.
Peake.....	Peake, Reports, N. P.
P. W.....	Peere Williams, Chancery Reports.
Ph.....	Phillips, " "
Pop.....	Popham, Insolvent Act of 1869.
Poth.....	Pothier, Traité des Obligations.

- Prac. & Chr. Rep..... Practice Court & Chambers Reports.  
 Price..... Price, Chancery Reports.
- Q.
- Q. B..... Queen's Bench, Reports.  
 Q. B. U. C..... " " Upper Canada, Reports.
- R.
- Ren. Fail..... Renouard des Faillites et Banqueroutes.  
 Rep. de Jur..... Guyot, Repertoire de Jurisprudence.  
 Rev. Leg..... Revue Légale (Lower Canada).  
 Rob. & J. Dig..... Robertson & Joseph's Digest (Ontario).  
 Rose ..... Rose, Reports, Bankruptcy.  
 Ross L. C..... Ross, Leading Cases in Commercial Law of  
 England and Scotland.  
 Russel..... Russel, Reports, Chancery.
- S.
- Salk ..... Salkeld, Reports, K. B.  
 S. C..... Same Case.  
 Scott..... Scott, Reports, C. P.  
 Sel. N. P..... Selwyn Reports, N. P.  
 Sim..... Simons " Chancery.  
 Smith Mer. Law..... Smith, Compendium of Mercantile Law (New  
 York.)  
 Stark ..... Starkie, Reports, N. P.  
 Story..... Story on Partnership.  
     " Eq. Juris..... " Equity Jurisprudence.  
 Str..... Strange, Reports, Chancery.
- T.
- Taun..... Taunton, Reports, C P.  
 T. R ..... Term Reports, Durnford & East, K. B.
- U.
- U. C. Prac. Rep..... See Prac. Rep.  
 U. C. C. P..... See C. P. U. C.
- V.
- Vern..... Vernon, Reports, Chy.  
 Ves..... Vesey, Sr.  
 Ves. & B. or V. & B.. Vesey & Beames, Reports, Chy.  
 Vin. Abr ..... Viner's Abridgment.
- W.
- W. R..... Weekly Reporter.  
 W. Bl... Blackstone, Sir William, Reports, K. B.  
 Willes..... Willes, Reports, K. B. & C. P.

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# INSOLVENT ACT OF 1875.

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38 VICTORIA, CHAP. 16.

*An Act respecting Insolvency, assented to 8th April, 1875.*

HER MAJESTY, by and with the advice and consent SEC. 1.  
of the Senate and House of Commons of Canada,  
enacts as follows :—

1. This Act shall apply to traders and to trading co-  
partnerships and to trading companies whether incor-  
porated or not, except Incorporated Banks, Insurance,  
Railway, and Telegraph Companies.

The following persons and partnerships or companies  
exercising like trades, callings or employments, shall be Application of  
held to be traders within the meaning of this Act :  
Act.

Apothecaries, auctioneers<sup>1</sup>, bankers, brokers<sup>2</sup>, brick-  
makers, builders<sup>3</sup>, carpenters, carriers<sup>4</sup>, cattle or sheep  
salesmen, coach proprietors, dyers, fullers, keepers  
of inns, taverns, hotels, saloons or coffee houses<sup>5</sup>,  
lime burners, livery stable keepers, market gardeners,  
millers, miners, packers, printers, quarrymen, share-  
brokers, shipowners, shipwrights, stockbrokers,  
stock-jobbers, victuallers, warehousemen, wharfingers,  
persons insuring ships or their freights or other matters  
against perils of the sea, persons using the trade of mer-

Who are tra-  
ders under this  
Act.

1. *Pozer v. Chapman*, Stuart, 122.

2. Ord. 1673.

3. *McGrath v. Lloyd*, 1 L. C. Jurist, 17; *Kennedy v. Smith*, 6 L. C. Rep., 27; *McKay v. Rutherford*, Ramsay's Digest, p. 773.

4. *H. M. Secretary of State v. Edmondstone et al.*, VI. L. C. Jurist, 322; *Rivers v. Duncan*, Robertson's Dig. 226.

5. *Paterson v. Walsh*, Rob. Dig., p. 49; *McRoberts v. Scott*, *ubi sup.*

SEC. 1. chandise by way of bargaining, exchange, bartering, commission, consignment or otherwise, in gross or by retail, and persons who, either for themselves, or as agents or factors<sup>6</sup> for others, seek their living by buying and selling or buying and letting for hire goods or commodities, or by the workmanship or the conversion of goods or commodities, or trees ; but a farmer, grazier, common laborer, or workman for hire shall not; nor shall a member of any partnership, association or company which cannot be adjudged insolvent under this Act, be deemed, as such, a trader for the purposes of this Act.

*As to persons having been traders.*

All such persons, co-partnerships, or companies, having been traders as aforesaid, and having incurred debts as such, which have not been barred by the statutes of limitations or prescribed, shall be held to be traders within the meaning of this Act ; but no proceedings in liquidation shall be taken against such trader, based upon any debt or debts contracted after he has so ceased to trade.

This section of the Act differs in an essential detail from the corresponding sections of the Acts of 1864 and 1869. The former of these was made applicable to traders only in the now Province of Quebec, but to all persons in Ontario; while the latter was, wherever in force throughout the Dominion, applicable to traders only; but in neither statute was any definition of the word attempted, as is done by the present Act. It remains to be seen whether the change is a beneficial one. It is certainly questionable whether it will be found so. Definitions of this nature run two dangers—of being too narrow or too broad ; and it has generally been found more advantageous for the Legislature to restrict itself to the use of a general and flexible term, leaving to the judiciary to apply this term to the circumstances of each particular case. An instrument is thus made of greater utility in dealing with the multiplied and changing phases of commercial enterprise. As it can hardly be expected that questions of doubt and difficulty will not arise, notwithstanding the evident attempt made in this section of the Act to make the definitions exhaustive, a reference to the cases decided in England where the distinction was kept up

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6. *Brehaut et al. v. Moran*, Rob. Dig., 156.

## SEC. 1.

until recently—only a trader defined as such being capable of becoming bankrupt, all others could only become insolvent and as such obtain relief only after imprisonment and through the Act for the relief of insolvent debtors—will serve to throw light on the practical application of this section, which was originally framed on the English category contained in the Act of 1849, which remained in force till the 1st January, 1870.

In England the first statutory definition attempted was by 1 Jas. I., Definition of c. 15, s. 2, by which a trader was defined as a person seeking to gain his living by buying and selling, or in the words of the statute.

By 1 Jas. I., c. 15, s. 2, (which was passed in the year 1604), it was enacted as follows:—

“ That all and every such person and persons using or that shall use the trade and merchandise, by way of bargaining, exchange, bartry, chevisance, or otherwise in gross, or by retail, or seeking his, her, or their trade or living by buying and selling, and being, &c., who, &c., shall be accounted and adjudged a bankrupt to all intents and purposes.”—Lee, p. 485.

This was interpreted, however, to mean that there must be buying and selling, or at least, an intent to sell. Buying alone, without an intent to sell, or selling alone, without a buying, did not constitute a trader, in a legal sense. I. Com. Dig. vo. Bankrupt, A. The buying must be a purchase in the common and ordinary, and not merely in the legal acceptation of the term. Per Lord Loughborough, *Parker v. Wells, Cooke*, 58.

Of late years, however, the English laws on bankruptcy have attempted more precise definitions; but the numerous legal contestations which have arisen on the subject show that, as already mentioned, it has been found impossible to make these exhaustive.

“ Probably there is no point in the bankrupt law, which has received so much consideration from the legislature, and the courts of law, as this of trading, and there being apparently no possibility of giving a definition of trading that would relieve the necessity of all specific expression or exclusion, the Legislature has gradually extended the meaning of the term, so that in law it now includes by name the specific designations comprised in the schedule, and the distinction between them and the general description of classes is this: the persons to whom these specific denominations are applicable come within the act, however little business they may transact in that capacity; but the other commercial classes only come within it if their business holds a prominent position in their avowed means of living.” Doria (1874) p. 113.

The list of persons given in this section is mainly taken from the Eng-

**SEC. 1.** lish statutes, and in fact when the bill of this act was introduced, the category was an almost verbatim copy of the English list. It will be well therefore to examine the decisions bearing upon the subject, which have been given in that country.

The true criterion to decide the question of trading is, not whether the party bought and sold to increase his income, but whether he did so with a view to gain his livelihood.

**Must be buying and selling.** The general description of a trader cannot be satisfied unless there be both a buying and a selling, but a small amount of actual dealing is enough, if there be sufficient evidence to show an intention to deal generally. (*Patman v. Vaughan*, 1 T. R. 572; *ex parte Moule*, 14 Ves. 603; *ex parte Maginnis*, Rose, 84; *Cannon v. Denew*, 10 Bing. 292; 5 Mo. & Sc. 761;) and in another case it was questioned whether a person, who sold goods for another on commission, but did not buy, was a trader. (*Hernamaun v. Barber*, 23 L. J., C. P. 145.)—Lee, p. 489.

**Trading must be public.** The rule as to occasional acts of trading is, that where it is a man's common or ordinary mode of dealing, or where if any stranger who applies may be supplied with the commodity in which the other professes to deal, and it is not sold as a favor to any particular person, there the person so selling is subject to the bankrupt laws as a trader; (*Patman v. Vaughan*, 1 T. R. 573.)

Thus a vintner, who before 6 Geo. 4, c. 16, sold only a few dozen of liquor to particular friends, could not be made a bankrupt, but if he desired to sell to every person that applied, that would subject him to the bankruptcy laws; (*Bartholomew v. Sherwood*, 1 T. R. 537, n., *ex parte Danbury*, 2 Dea. 72.) Whether or not a person is a trader does not depend upon his occasionally doing acts of trading, but upon the intention generally so to get his living; (*ex parte Patterson*, 1 Ro. 402; *Newland v. Bell*, Holt, 221; *ex parte Lavender*, 4 Dea. & C. 487.)

**Dentists.** A person who manufactured artificial teeth for sale, but also practised as a dentist, was held to be a trader. (*In re Brophy*, 19 W. R. 176.) —Lee, p. 488.

**Fisherman.** A fisherman buying fish of other boats at sea, and selling it on shore, is a trader, and, if such be the usual practice of a particular class of fishermen, one of them who is proved to have done so once will be presumed to have continued to carry on his business in the same manner till the time of his bankruptcy; (*Heanney v. Birch*, 1 Ro. 356; 3 Camp. 233; *Gale v. Halfknight*, 3 Stark, 56.)

A fisherman, owning fishing smacks, which he uses for fishing purposes only, is not a trader as a ship owner; (*in re Stubbs*, 22 L. T. 291.)

If a man purchase goods for his own use, that will not make him a trader, even though he afterwards sell such of them as he may not

## SEC. I.

have occasion for; because he does not seek his living by the buying and selling, (see dictum of Lord Mansfield in *Wells v. Parker*, 1 T. R. 34; and see *Summerset v. Jarvis*, 3 Brod. & Bing. 2; 6 Moore, 56.)

If a man buy horses to sell again with a view to profit, he is a Horsedealer. trader; but if he sell only such as he bred and reared himself, he is not. (*Ex parte Gibbs*, 2 Rose, 38; *Wright v. Bird*, 1 Price, 20.)

When a man purchases standing timber to sell again, with a view Lumberers. to profit, he has been held a trader; but if he sells only such as he cuts down upon his own land it would be otherwise, (*Holroyd v. Gwynne*, 2 Taunt. 176.) It is questionable whether this would be the ruling followed here, as this section includes specially the workmanship and conversion of trees.

A person who works up lumber is a manufacturer engaged in "the Lumberers. workmanship and conversion of goods." The fact that he buys the land as well as the material does not appear to be material.

It is not like the case of a farmer making cider or cheese. These products, when made by the farmer, exclusively from his own farm, are not usually made on so large a scale as to be called a manufacturer, as the word is now commonly used; and the making is one merely incidental to the cultivation of his land.

But in the case of lumber, the land may be almost said to be incidental to the lumber which usually forms its chief value, and the manufacture itself is the main sort of profit, independently of any cultivation or other use of the land: (*in re Chandler*, 4 B. R. 213; s. c. Lowell, 478; s. c. 2 L. T. B. 170.)

If the owner of an estate, with a view to its improvement, build Houseowner. houses, and afterwards happen to sell or let them, he cannot be called a trader, (*ex parte Neirincks*, 2 Mon. & A. 384.)

It has also been held necessary, in order to make a man bankrupt Buying and as a trader by buying and selling, that there should have been a re-<sup>Buying and selling should be repeated.</sup>peated practice of it; for a single act of buying and selling unaccompanied by an intention to continue it, is not sufficient, (Cooke, 64; *ex parte Bowes*, 4 Ves. 168; *ex parte Blackmore*, 6 Ves. 3; *Hankey v. Jones*, Cowp. 748; and see *Bolton v. Sowerby*, 11 East, 274; *ex parte Duffaur*, 21 L. J. Bank, 38.) But if this intention exist, the extent of the trading, whether large or trifling, prior to the bankruptcy, will be immaterial, (*Patman v. Vaughan*, 1 T. R. 572; *Bartholomew v. Sherwood*, 1 T. R. 573.) A mere trifling buying and selling, quite collateral to a man's line of life, even though it yield him a profit, will not render him a trader; as, for instance, a schoolmaster who buys books, &c., and sells them at an advanced price to the scholars, is not on that account a trader; (*Valentine v. Vaughan*,

## SEC. 1.

1 Peake, 76; see *Bolton v. Sowerby*, 11 Eas. 276; *Sir Thomas Littleton's case*, 1 Ven. 270; *Gibson v. Thomson*, 3 Keb. 451.)

This decision and the two following are of importance in considering the application of the present act to persons following for a time or as a kind of side issue to their ordinary means of livelihood the avocations named in the section under consideration.

Occasional  
trading.

Every one who buys and sells, unless it be the mode by which a living is sought, is not a trader; nor is a mercantile act, although resulting in a profit, alone sufficient to constitute a trading, (*Newland v. Bell*, 1 Holt, 221; *ex parte Atkinson*, 1 M. D. & DeG. 300.)

A practising barrister prepares periodically a series of legal reports and a digest, paying for professional assistance to enable him to complete the manuscripts. He buys paper, pays for the printing of his work upon it, and sends it to a publisher for sale upon commission. Yet he is held not to be a trader within the meaning of the bankruptcy laws. (*In re L.* 7 C. C. Chron. 87; and see *in re Hare*, L. T. Rep. 15; *ex parte Hammond*, 1 DeGex, 93; *Stuart v. Sloper*, 3 Exch. Rep. 700.)

In order to be brought within the scope of the Act, and obtain a discharge from indebtedness, there will exist a temptation for non-traders to assume the role of traders. This kind of trading will not support bankruptcy. (*Ex parte Dart*, 3 D. & C. 543; *ex parte Hall*, M. & C. 445, 479.)

A trading to be within the bankrupt laws must be a substantive and independent trading; there must be a general intention to trade; and a trading as a means of gaining a livelihood. (*Paul v. Dowling*, 1 Moo. & M. 263; *Heane v. Rogers*, 9 B. & C. 578; *ex parte Burgess*, 2 G. & J. 183; *Newton v. Newton*, Cookes B. L. 71, *ex parte Ridge*, 1 Rose 316; *ex parte Gardner*, 1 Rose 377; *ex parte Gibbs*, 2 Rose, 38; and cases cited at Doria ed. 1874, p. 126, *et seq.*) The editor and proprietor of a newspaper is a trader within the bankrupt laws; so is a publisher who buys the whole daily impression of a paper to resell at a profit, (Doria, 1874, p.)—A surgeon who confines the sale of his drugs to his patients is not a trader. (*Ex parte Daubeny*, 3 M. & A. 16; *Nicholson v. Cooper*, 31 L. T. Rep. 184, Ex.); nor is a farmer, who makes cider from his orchard, though he purchases apples yearly from his neighbors to make up his supply. (*Ex parte Gallimore*, Rose, 427.)

A farmer who occasionally buys hay, corn, horses, &c., with a view to sell again for profit does not thereby become a trader; (*Stewart v. Ball*, 2 N. R. 78; but see *Bartholomew v. Sherwood*, 1 T. R. 573, n.)

A person who buys any article with the purpose of mixing it with his own produce, with a view to sell the mixture more advantageously

than his own produce could be sold unmixed does not thereby become a trader; (*Patten v. Brown*, 7 Taun. 409.)

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A smuggler, dealer in contraband goods, by buying and selling, is <sup>Contraband</sup> trading. a trader, and liable to be adjudged a bankrupt as a trader, although such buying and selling is illegal; (*Cobb v. Symonds*, 1 D. & R. 111; 5 B. & Al. 516; *ex parte Meymot*, 1 Atk. 197.) A trader may be a bankrupt as such, although he has not taken out a license necessary to legalize his trade; (*Saunderson v. Rowles*, 4 Burr. 2064.) But a buying in connection with others to carry on a system of fraud is not a trading; (*Millikin v. Brandon*, 1 C. & P. 380; *ex parte Dart*, 2 Dea. & C. 543.—Lee, p. 488.)

The legality or illegality of the buying or selling, makes no difference; it has been held that a trader may become bankrupt, although he has not taken out a license necessary to legalize his trade. (*Sanderson v. Rowles*, 4 Burr. 2066; *Martin v. Nightingale*, 11 Moore, 305.)

A party, whose only business is speculating in stocks, is not a Stock speculator. merchant or tradesman if he keeps no office and buys and sells through brokers. (*In re William H. Marston*, 5 Bt. 430.)

Dealing in shares in joint stock companies does not constitute a man a trader. (*In re Cleland*, 2 L. R. Chy. 466.)

A person whose occupation is that of a baker, and who buys flour which he converts into bread, and then sells the bread to daily customers, is a tradesman. (*In re Cocks*, 3 Bt. 260.)

A surgeon, who was also licensed to practise as an apothecary, and Apothecary. supplied medicines to his patients, but to no other persons, was held liable to become a bankrupt as an apothecary; (*ex parte Crabb v. Palmer*, 8 D. M. G. 277; 2 Jur. N. S. 628; 25 L. J. Ba. 45; 27 L. T. 93; see *ex parte Danbury*, 2 Dea. 72.)—Lee, p. 491.

It is not necessary that a banker should keep an open shop; *ex parte Bankers. Wilson*, 1 Atk. 218. A person is a banker, who receives money as a banker, although his books are kept in a different manner from that in which bankers' books are usually kept; and although upon his receiving any large sum, he pays it to his own established banker, upon whom he gives drafts for the payment of large bills upon time, he is only keeping cash to answer small drafts. *Ib.* An army agent is not, as such, a banker; (2 H. Bl. 235; 1 Mont. & G. Dig. 2; *Richardson v. Bradshaw*, 1 Atk., 129.)—Lee, p. 491.

The word "brokers" includes pawnbrokers, whose liability continues Brokers. as long as they have unredeemed pledges for sale, although not taking new pledges; (*Highmore v. Molloy*, 1 Atk. 206; *Rawlinson v. Pearson*, 5 B. & Al. 124; and Ship-brokers; *Pott v. Turner*, 6 Bing. 762; 4 M. & P. 551.)—Lee, p. 491.

**SEC. 1.** It seems that by a carpenter is meant a person who buys wood and other materials, and works them up for sale.

**Lodging house keepers.** Under 6 Geo. 4, c. 16, s. 2, it was held that the keeper of a private lodging house, who also sought a profit by furnishing her guests with provisions, was subject to the bankrupt laws as an hotel keeper, although the provisions were set apart as the separate property of each guest; (*Smith v. Scott*, 9 Bing, 14; 2 Mo. & Sc. 35.) A person may be a lodging house keeper, without being a trader; but such person, keeping a boarding and lodging-house, where guests are entertained by the month or week, each having a bedroom to himself, but taking meals with the proprietor of the house, is a trader being regarded as a hotel keeper; (*Gibson v. King*, 10, M. & W. 667; 1 Car. & M. 458.)

A party who lets furnished lodgings is not a trader within the bankrupt law, under the words "buying and letting for hire goods and commodities," notwithstanding he buys the furniture for the purpose of being let with the lodgings, where the principal object was the letting of lodgings, and the letting of furniture was only accessory thereto; (*ex parte Bovers*, 2 Dea. 99; 3 Mo. & Sc. 33.)—Lee, p. 493-496.

**Trading must be of goods.** It has been decided that "buying and selling" was to be connected with goods or commodities, and did not apply to dealing in a mere *chance in action*; (*in re Cleland*, L. R. 2 Ch. 476.).

**Printers.** The printing and publishing of a daily newspaper is manufacturing, i. e., a workmanship and conversion of goods—in the strict sense of the law. A newspaper publication is as much the result of manufacture as that of books, or cards, or billheads. (*In re Kenyon & Fenton*, 6 B. R. 238.)

**Declarations by party.** The declarations of a bankrupt with the parties with whom he is dealing respecting his transactions in trade are not evidence to prove the trading of such bankrupt; (*Burnley v. King*, 1 C. & P. 646; S. C. *Burnley v. King*, Ky. & Mo. 228.) But declarations made by a party of his object in buying a particular article are admissible in evidence to prove his intention, and whether he thereby became a trader; (*Gale v. Halfknight*, 3 Stark, 56.)

**Trading—a question of law.** It has been said that whether a man is a trader within the bankrupt laws is a question of law and not of fact; (*Hawkey v. Jones*, Coop. 752; *Gale v. Halfknight*, 3 Stark, 56.)

A person who had traded to England, whether native, denizen or alien, though never a resident trader in England, but went there occasionally, and committed an act of bankruptcy, was held to be an object of the bankrupt laws. (*Alexander v. Vaughan*, Coop. 398.—Lee, p. 490.)

**Infants.** An infant cannot trade, because his contracts made for goods for the

## SEC. 1.

purpose of trade are absolutely void; (*Thornton v. Illingworth*, 2 B. & C. 824); and it is well settled by a long series of decisions that he is not liable to the bankruptcy laws. (*Ex parte Adam*, 1 V. & B. 493; *O'Brien v. Currie*, 3 Car. & P. 283; Lord Raymond's Rep. 443; *ex parte Watson*, 16 Ves. 265.)

An adjudication of bankruptcy cannot be supported against a per. Infants. son as a trader by reason of a trading by him during his infancy; (*Stevens v. Jackson*, 4 Camp. 165, 1 Marsh. 469; 6 Taunt. 106; 2 Ro. 284. *Ex parte Moule*, 14 Ves. 603; *O'Brien v. Currie*, 3 C. & P. 283; *ex parte Adam*, 1 V. & B. 494; see as to petitions against infants.)—Lee, p. 487.

But in the province of Quebec "a minor engaged in trade is re. **Minors.**" puted of full age for all acts relating to such trade," Art. 323 of the Civil Code, and consequently would come under the operation of the present act.

The criterion of a *feme covert* being capable of falling under the bankrupt laws appears to be her liability to be sued to execution for the debts she has contracted during coverture. If a married woman is so circumstanced as to be subject to a common law execution, there does not seem to be any reason why she should not likewise be subject to this statutory execution; (*ex parte Preston*, Green 8; Cooke's B. L. 40; *ex parte Carrington*, 1 Atk. 206; *Lavie v. Phillips*, 3 Burr, 1776; *ex parte Mear*, 2 B. C. C. 266).

In the province of Quebec a married woman may with the consent of her husband, become a trader, even though community of property exist between them; (art. 179 of the Civil Code) and in that case she would be subject to the operation of the present act.

It is doubtful if the Ontario Statute respecting the separate property of married women, (Con. Stats. U.C., c. 73), will affect the application of this Act to that class of persons in that province. For although under the provisions of that statute, a married woman possesses entire control over her property, which is liable to execution for her torts, there is nothing to show that it is liable to execution at law for her contracts made during coverture. The separate estate may of course be placed in equity; but whether that would render it liable to attachment in bankruptcy proceedings is very questionable. It is probable however that a woman who has obtained an order protecting her earnings under the above mentioned act may become an insolvent as to that portion of her estate. Edgar, p. 36.

A lunatic may be a bankrupt provided the act of bankruptcy be **Lunatics.** committed during a lucid interval; (*ex parte Friddey*, Cooke 48; *Anon.* 13 Ves. 590; *ex parte Stamp*, 1 DeG. 345.)

**SEC. 1.**  
**Executors.**

An executor, who carries on the business of his testator for the benefit of the legatees, may be a bankrupt as a trader, but he does not become so liable merely by disposing of the stock in trade of his testator, although he may buy some other goods to render those in hand more saleable.

The distinction is, that if an executor or administrator only buys with the intent of selling the testator's stock as soon as it can conveniently be done, he would not be considered a trader, but if he carries on the trade with an intent of continuing it indefinitely, and to make a general profit for the benefit either of himself, or of those beneficially entitled to the stock, he clearly would be a trader; Eden's B. L. 5; Wms. Ex. 1656, 6th edit: (*Garrett v. Noble*, 6 Sim. 504; *Viner v. Cadell*, 3 Esp. 88.)—Lee, p. 487. See sec. 117 *post*.

**Difference from former acts.**

**Joint stock companies.**

Another important difference between the present act and the former statutes on the same subject is the extension of the operation of this to incorporated trading companies. This is a useful and needed change, in view of the ever increasing favor with which this mode of carrying on commercial enterprises is being regarded; and the numerous companies of that description which are, with a facility and prolificness, the policy of which is certainly questionable, being yearly created, as well by letters patent, as at every session of our local and Dominion legislatures, often with capitals smaller than those of many private firms, and with the merest nominal amount paid up.

The Civil Code of the province of Quebec, arts. 368 *et seq.* and arts. 997 *et seq.* of the Code of Civil Procedure did indeed provide a machinery for the winding up of these companies, but its operations were cumbersome, and depended upon obtaining the intervention of the Attorney General of the province. (See the case of the Montreal Patent Guano Co., Montreal, 1874.)

Section 147 *post*, provides the rules of procedure for bringing such companies within the operation of this act.

The powers of a corporation must be determined by its charter. A corporation is an artificial person or the creature of the law. It has no powers except what are given by its incorporating act, either expressly or as incidental to its existence, and its express powers. The mere power does not make the company a manufacturer, unless it actually engages in the business of manufacturing. The business must also be carried on for the purpose of selling the products manufactured, and not for the exclusive use of the company, to make it a manufacturer within the meaning of the bankrupt law. (*Ala & Chat R. R. Co. v. Jones*, 5 B. R. 97.)

The final clause of this section contains in an amplified form an amendment made to the act of 1869 by 34 Vic. c. 71, s. 1.

The following decisions bear upon the principle.

A man once a trader is liable to the bankruptcy laws until all his debts are paid, whether contracted during the period of his trading, *Former trading (ex parte Dewdney*, 15 Ves. 495; *ex parte Bamford*, 15 Ves. 458; *Doe v. Lawrence*, 2 Car & P. 134), or incurred before that time, and in no way connected with his trading, (*Baillie v. Grant*, 9 Bing. 121; 2 M. & Sc. 193, 6 Bligh 459, appealed to House of Lords.) This clause would probably produce a different ruling than those had in *Bagwell v. Hamilton*, 10 U. C. Jour. 305; and in *Lacombe v. Lanctot*, 16 L. C. Rep. 166.

Although a commercial firm be dissolved, the members thereof are *Dissolved firm*. still partners for the liquidation of the affairs of the old partnership, and a writ of compulsory liquidation against them as co-partners is well founded. And, under any circumstances, upon the principle that interest is the measure of actions, a creditor of one of the individual partners has no right, as against the creditors of the dissolved firm, to oppose the attachment. (*The City of Glasgow Bank v. Ar-buckle et al. & Kerry et al., petitioners*, 16 L. C. Jurist, p. 218.)

The fact that a manufacturing firm has been dissolved by the death *Surviving partners*. of one of the partners, and the survivor is engaged in settling its affairs, and closing up its business at the time of giving the draft, does not divest the latter of his character of manufacturer, especially when the debt which forms the consideration of the draft is a debt contracted by the firm in the course of its manufacturing business. (*In re R. Stevens*, 5. B. R. 112; s. c. Law, 397.)

A man who has retired from business may become a bankrupt as a trader in respect of debts contracted during the period of his trading; (*Willoughby v. Thornton*, 1 Selw. N. P. 175; *Doe. d. Barrand v. Lawrence*, 2 C. & P. 134; *Dave v. Holdsworth*, Peake, 64; *ex parte Dewdney*, 15 Ves. 495.)

**2.** The word "county" shall mean a county or union *Interpretation: County District.* of counties, and the word "district" shall mean a district, as defined for judicial purposes by the Legislature of the Province wherein the same is situate.

a. "Official Assignee" shall mean the person or persons *Official assignee.* appointed by the Governor in Council, as hereinafter provided, to act as Assignee or Joint Assignee under this Act in any County or District.—"Assignee" shall *Assignee.* mean either the Official Assignee or the Assignee appointed by the creditors, as the context may require.

b. "Official Gazette" shall mean the Gazette published *Official Gazette.* under the authority of the Government of the Province

**SEC. 2.** where the proceedings in Bankruptcy or Insolvency are carried on, or used as the official means of communication between the Lieutenant-Governor and the people ; and if no such Gazette is published, then it shall mean any newspaper published in the County, District or Province, which shall be designated by the Court or Judge for publishing the notices required by this Act.

**Court.** c. The word "Court" shall mean the Superior Court in the Province of Quebec, the Court of Queen's Bench in the Province of Manitoba, and the County Courts in the Provinces of Ontario, New Brunswick, British Columbia, and Prince Edward Island, and also in Nova Scotia, whenever County Courts shall have been established in that Province, and until such County Courts are established it shall mean the Court of Probate of that Province.

**Judge.** d. The word "Judge" shall mean a Judge of the said Courts respectively, having jurisdiction in the County or District where proceedings shall be had under this Act, and shall also include a Junior and Deputy Judge when such are appointed.

**Debtor.** e. The word "Debtor" shall mean any person or persons, co-partnership, company or corporation having liabilities, and being subject to the provisions of this Act.

**Insolvent.** f. The word "Insolvent" shall mean a debtor subject to the provisions of this Act unable to meet his engagements, or who shall have made an assignment of his estate for the benefit of his creditors.

**Notary.** g. The words "before Notaries" or "before a Notary," shall mean executed in notarial form, according to the laws of the Province of Quebec.

**Creditor.** h. The word "Creditor" shall mean every person, co-partnership or company to whom the Insolvent is liable, whether primarily or secondarily, and whether as principal or surety ;—but, in reference to proceedings at meetings in Insolvency, to the right of voting, to the execution of a deed of composition and discharge, the consent to a discharge of an Insolvent, or any other consent or action with regard to the management and disposal of the estate of an Insolvent, the word "Creditor" shall mean a person, co-partnership or company whose unsecured claims, to

**As to voting,  
composition,  
&c.**

an amount of one hundred dollars or upwards, have been proved in the manner provided by this Act, and the proportion of claims in value required to give validity to any such proceeding or action shall be formed of all claims so proved, whether above or under one hundred dollars, and of no others; and with regard to any deed of composition and discharge, or the consent to a discharge of the Insolvent, no creditor whose claim is not affected by such discharge shall be reckoned as one of the required number of creditors, nor shall his claim be reckoned as forming part of the proportion of claims required to give effect to such composition and discharge. For all the purposes of this Act the required amount of the creditor's claim shall be over and above any set-off or counter-claim of the debtor against such creditor; and every affidavit of indebtedness made by any creditor shall be construed as made in this sense.

i. The word "collocated" shall mean ranked or placed in the dividend sheet for some dividend or sum of money. Collocated.

j. In the case of any partnership or any company, Partnership,  
and companies. incorporate or not, the word "he," "him," or "his," used in relation to any Insolvent or Creditor, shall mean "the partnership" or "the company" or "of the partnership" or "of the company," (as the case may be) unless the context requires another interpretation to give such effect as the purposes of this Act require, to the provision in which the word occurs.

**3. A debtor shall be deemed insolvent—**

a. If he has called a meeting of his creditors for the purpose of compounding with them, or if he has exhibited a statement shewing his inability to meet his liabilities, or if he has otherwise acknowledged his insolvency : Acts of Insol-  
vency.  
Acknowledging  
insolvency.

This sub-section does not occur in the act of 1869. The other clauses of this section are the same as those of section 13 of that act, and were by it declared to be causes subjecting the debtor's estate to compulsory liquidation.

Parol evidence of the acknowledgment of insolvency would probably be insufficient.

"The involuntary feature of the bankrupt law is punitive in its

**SEC. 3.** character and effect, and as such should only be applied to those who do some act forbidden by the law, or who fail to do some act required by it. It is not the contracting the debt only that constitutes the act of bankruptcy, but it is something that is done, or neglected to be done afterwards, and contemplates the power in each individual to refrain from doing the thing forbidden, or having the power to do the thing required. This every partner is presumed to possess, although one who has only lent his credit to the firm by holding himself out as a partner, and thereby liable to those who gave credit on that account, having no interest in the business, or having no voice in the control over its affairs, has not such power, and is not, therefore, subject to be declared a bankrupt for an act of bankruptcy committed by the firm. (*Moore v. Walton*, 9 B. R. 402.) Bumps, p. 385.

**Absconding.** b. If he absconds or is immediately about to abscond from any Province in Canada with intent to defraud any creditor, or to defeat or delay the remedy of any creditor, or to avoid being arrested or served with legal process ; or if, being out of any such Province in Canada, he so remains with a like intent ; or if he conceals himself within the limits of Canada with a like intent :

In the Bankrupt Laws of England and the United States are provisions similar to this and the following sub-sections. (See Doria, Law of Bank ; 1874, Lee, p. 16, James on Bank. Law, 1867, p. 227 *et seq.*, Bumps, pp. 30, 363.)

In England an adjudication in bankruptcy cannot be sustained where the departure was for a fair and proper purpose, and not with a view of defrauding or delaying the creditors. A man has a right to go abroad to look after his concerns though his creditors may be thereby delayed. But it would be otherwise if apprehension of arrest were coupled with a justifiable motive. (*Ex parte Mutrie*, 5 Ves. 576 ; *Warner v. Barber*, Holt, 175.)

If a trader, after going abroad in the first instance for a proper object, protract his residence abroad for an unreasonable time, assigning no cause for his absence, and leaving no funds, nor making any arrangements for the payment of his debts, the inference will be that he remains abroad with intent to delay his creditors ; (*Cumming v. Bailey*, 6 Bing. 370.)

A person going abroad for a legitimate purpose, and remaining abroad without making any provision for the payment of his debts, or sending money for that purpose, is remaining abroad with intent to delay his creditors ; although he constantly stated in his letters his intention to come home in a month or six weeks, but fixed no definite time, (*ex parte Cohn*, 2 L. T. (N. S.) 90 Bank.)

A departure with *intent* to delay creditors is an act of bankruptcy, though no creditor is thereby delayed. (Cooke's Bank. Law, 4th ed. 74; *Aldridge v. Ireland*, 7 T. R. 512.) On the other hand, where the delay of the creditors is the necessary consequence of the debtor absenting himself, the departure then constitutes an act of bankruptcy. (*Ramsbottom v. Lewis*, 1 Camp., 279. See also *Fowler v. Padgett*, 7 Term. Rep. 509, where this principle is fully explained and illustrated. See also *Rawson v. Haigh*, 9 Moore, 217.)

If the intent to delay creditors can be proved, either in the departure from the country, or in the remaining abroad, or can be inferred as the necessary and foreseen consequence of the delay actually produced, an act of bankruptcy will be proved, (Eden's B. L. 16.)

The cases decided in the Province of Quebec on the subject of *capias*, when based on the interpretation of the terms "absconding, intending to abscond, secreting, &c., with intent, &c.," will be found useful in interpreting this section and may be gathered from the following cases: (*Lamarche v. Lebrocq*, 1 L. C. Rep. 215; *Leeming v. Cochrane*, ibid, 352; *Wilson v. Ray*, 4 L. C. Rep. 159; *Larocque v. Clark*, ibid, 402; *Tremain v. Sansum*, 4 L. C. Jur. 48; *Larocque v. Clark*, Cond. Rep., L. C. 67; *McDougall v. Torrance*, 5 L. C. Jur. 148; *Ross v. Burns*, (in appeal), 10 L. C. Jur. 89; *Perrault v. Desève*, s. c. L. R. p. 19; *Cornell v. Merrill*, L. C. R. p. 357; *Benjamin v. Wilson*, 1 L. C. R. p. 351, and the numerous other cases to be found under this head in the reports and Digest.)

c. Or if he secretes or is immediately about to secrete <sup>Secreting effects.</sup> any part of his estate and effects with intent to defraud his creditors, or to defeat or delay their demands or any of them:

The word, "secretion" has been interpreted in the Province of Quebec, (where, by the Civil Code, it is made one of the grounds for an arrest by *capias*,) to mean an actual, and not a constructive, secretion.

In the case of the Molsons Bank against McMinn ; the defendant, having pledged a bill of lading to the Bank, subsequently, on the arrival of the goods at Montreal from the upper Lakes, obtained possession of the bill for the ostensible purpose of attending to the transhipment, and gave the Bank a bailee trust receipt therefor. After the wheat was placed on the ocean-going vessel, and a new bill of lading received, he pledged this new bill to another Bank as security for new advances, which at once disappeared in his business, he being at the time, and knowing himself to be, utterly insolvent. The Bank had him arrested on a *capias*, as having secreted his pro-

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perty. It was held that though the act complained of was doubtless a "fraudulent making away" it was not a secretion in law. *The Molsons Bank v. McMinn*, Superior Court, Montreal, 1874.

See notes to previous clause.

Fraudulently  
assigning.

d. Or if he assigns, removes or disposes of, or is about or attempts to assign, remove or dispose of, any of his property with intent to defraud, defeat, or delay his creditors, or any of them.

An intent to hinder, delay, or defraud one creditor, is such an intent as the bankrupt act contemplates. (*Perry v. Langley*, 1 B. R. 559; s. c.; 1 L. T. 7. B. 34; s. c. 7 A. L. Reg. 529: *contra, in re Dunham & Co.*, 2 B. R. 17; s. c. 1 L. T. B. 89; s. c. 2. B., L. 488.) Bumps, p. 371. (Ed. 1874.)

Intention, the  
main condition.

The intention to defraud, defeat or delay creditors, is the main ingredient in the three foregoing acts of bankruptcy. If this intention actually existed at the time the act was committed, it is little matter whether a creditor was thereby defeated or delayed, or not, (*Robertson v. Liddle*, 9 East, 487; *Wydown's case*, 14 Ves. 86; *Chenowet v. Hay*, 1 M. & S. 676; *Aldridge v. Ireland*, 1 Taunt, 273; *Colkett v. Freeman*, 2 T. R. 59). On the other hand a creditor being in fact delayed by the act, is not of itself evidence of the debtor's intention in committing it, (*ex parte Osborne*, 2 Ves. & B. 177; *Fowler v. Padget*, 7 T. R. 509). The intent can only be evidenced by the debtor's acts or admissions. If a man admit that he committed the act with such an intent, it is almost conclusive evidence of it, and can scarcely be explained away, (see *Rawson v. Haigh*, 2 Bing. 99). Anything said or written by the bankrupt before his bankruptcy, tending to show the intent of an act equivocal in itself, is admissible, (*Smith v. Cramer*, 1 Scott, 441; *Scott v. Thomas*, 6 Car. & P. 611. If the necessary consequence of the debtor's act be that his creditors must be thereby defrauded, defeated or delayed, this is presumptive evidence of his intention to do so. (*Freeman v. Pope*, L. R. 5 Chy. 538; *Ramsbottom v. Lewis*, 1 Camp. 279; *Holroyd v. Whitehead*, 3 Camp. 530; *ex parte Kilner*, 2 Dea. 325; 3 Mon. & A. 722). The presumption raised by circumstances attending the act may be rebutted by evidence that the debtor did not at the time entertain the intention imputed to him. For instance, he may prove that upon leaving the country he left a partner behind him, (*Ramsbottom v. Lewis*, *jubi supra*); or that his presence out of the country was absolutely necessary in order to look after his concerns there, (*ex parte Mutrie*, 5 Ves. 576; *Warner v. Barber*, 1 Holt, 175); or that previous to his departure he made arrangements that the interests of his creditors should be attended

to in his absence, (*Ramsbottom v. Lewis, ubi supra*: and see *Windham v. Patterson*, 1 Stark, 144).

The mere intention on the part of a debtor to dispose of his property, and the apprehension of his sole creditor that he will not then, although perfectly able, and owing no one else, pay the creditor his debt, does not bring the debtor within this clause, (*Sharp et al. v. Matthews*, 5 Prac. Rep. U. C. 10); Rob. & J. Dig. 411.

e. Or if with such intent he has procured his money, goods, chattels, lands or property to be seized, levied on or taken under or by any process or execution, having operation where the debtor resides or has property, founded upon a demand in its nature proveable under this Act, and for a sum exceeding two hundred dollars, and if such process is in force and not discharged by payment or in any manner provided for by law. •

Under the English act it has been held that 'procuring,' means taking the initiative, and causing the thing to be done in the ordinary sense of the word. There must be, in the act, an intent to delay or defraud the creditors. Where there was an honest and proper motive on the part of the debtor in granting a judgment, no act of bankruptcy is committed. (*Gore v. Lloyd*, 13 L. J. 366 Exch.)

An act of bankruptcy by procuring goods to be taken in execution is not committed till actual seizure, and when so committed is not carried back by relation to an earlier period, (*Belcher v. Gunmow*, 11 Jur. 286; *Gibson v. King*, 1 Car. & M. 458.) The mere allowing a judgment to go by default, under which judgment the debtor's goods are taken in execution, is not in itself 'procuring the goods to be taken in execution, so as to constitute an act of bankruptcy, (*Gibson v. King, ubi supra*).

Refraining from entering an appearance to an action by a creditor on a specially endorsed writ, whereby he obtains judgment and a priority over other creditors, is not in itself a procuring of his goods, etc., to be seized or taken in execution within the meaning of the Act; but it is open to the creditors to satisfy the Judge that the taking in execution was through the procurement of the insolvent.

The debtor must do this with intent on his own part to give a preference to the creditor; or with the intent to defeat or delay the operation of the act. (*In re Diblee et al.* 2 B. R. 617 S. C. 3. Bt. 283.)

f. Or if he has been actually imprisoned or upon the gaol limits for more than thirty days, in a civil action founded on contract for the sum of two hundred dollars

SEC. 3. or upwards, and still is so imprisoned or on the limits ; or if, in case of such imprisonment, he has escaped out of prison, or from custody, or from the limits.

This provision is not to be found in the English Act of 1869, but one similar existed in former Acts, (Act of 1861 c 71,) and under it, it has been held that in order to constitute this act of bankruptcy there must be an uninterrupted imprisonment for more than thirty days. If a man arrested ~~is~~ bailed out before the expiration of the thirty days, and afterwards render in discharge of his bail, and remain in custody thereafter, the thirty days will begin to run on the day of the render, and not on the day of the original arrest. (*Ex parte Dufrène*, 1 Ves. & B. 51; *Tribe v. Webster*, Willes, 464.)

**Delays.** In England the days were reckoned exclusive of the first, and inclusive of the last, unless the last falls on a Sunday or holiday, or a day appointed for a public fast or thanksgiving. Formerly, the first and last days were included. *Doria & Macrae on Bank*. 157.

In the Province of Quebec, neither the first nor last days would be included. *Civil Procedure, Art. 24. Rules Practice in Ins.*, No. 12.

The word "day" is not defined in this Act. By sec. 143 of that of 1869, "day" when used in the Act, was stated to mean a juridical day. It is probable that now, at least in the Province of Quebec, non-juridical days would be reckoned in the computation of delays. See Art. 24 of the Code of Civil Procedure.

By the United States Act, imprisonment for twenty days is sufficient. *Bumps*, p. 363.

**Making default to appear.** g. Or if he wilfully neglects or refuses to appear, on any rule or order requiring his appearance, to be examined as to his debts under any statute or law in that behalf.

h. Or if he wilfully refuses or neglects to obey or comply with any such rule or order made for payment of his debts or of any part of them.

Personal service of such a rule would probably be required if it could possibly be effected ; and no proceedings could be had on such rule or order while a contestation was pending upon it. *Lee*, p. 16.

**Or decree, &c.** i. Or if he wilfully neglects or refuses to obey or comply with an order or decree of the Court of Chancery or of any of the judges thereof, for payment of money. See *ex parte Danks*, 2 M. & G. 936. *Lee*, p. 53.

*j.* Or if he has made any general conveyance or assignment of his property for the benefit of his creditors, <sup>Making assignment otherwise than under this Act, &c.</sup> SEC. 3.

if, being unable to meet his liabilities in full, he makes any sale or conveyance of the whole or the main part of his stock in trade or of his assets, without the consent of his creditors, or without satisfying their claims.

An assignment by a trader, by way of mortgage of his stock and implements of trade, where such an assignment does not include one-half of all his effects, is not *per se*, an act of bankruptcy, even though his business may be stopped thereby. (*Young v. Wand*, 8 Exch. Rep. 221.)

The intention to defeat or delay his creditors is of no moment with <sup>Intention immaterial.</sup> regard to this act of bankruptcy, as that being the necessary consequence of the assignment he must in law be taken to have intended it. (*Stewart v. Moody*, 1 C. M. & R., 777; *Seibert v. Spooner*, 1 M. & W., 718; *ex parte Alsop, in re Rees*, 1 D. F. & J. 289; 29 L. J. Ba. 7.)

Parties who were privy and had assented to a deed of assignment, could not set it up as an act of bankruptcy. (*Bandford v. Baron*, 2 T. R. 594; *Marshall v. Barkworth*, 1 Nev. & M. 279; 4 B. & Ad 508.)

v. Lee, pp. 15 & 23; Bumps, pp. 30, 363, 368, 370.

It is not an element of this act of bankruptcy that the debtor shall be, at the time of committing it, bankrupt or insolvent, or in contemplation of bankruptcy or insolvency, nor is any allegation to that effect necessary. (*In re Dunham & Co.*, 2 B. R. 17; s. c. 1 L. T. B. 89; s. c. 2 Bt. 488; *in re Randall & Sunderland*, 3 B. R. 18; s. c. 2 L. T. B. 69; s. c. *Deady*, 557; *in re Nickodemus*, 3 B. R. 230; s. c. 1 L. T. B. 140; s. c. 2 C. L. N. 49; s. c. 16 Pitts, L. J. 223; *in re Thomas Ryan*, 6 Pac. T. R.; s. c. 4 C. L. N. 450.)

A transfer of the firm property by one partner to his copartner is not a conveyance to hinder or delay the firm creditors.

A sale of all the debtor's property for a small portion in cash and the balance in long notes does to that extent delay creditors. (*Dean v. Garrett*, 2 B. R. 89.) Lee, p. 370.

*k.* Or if he permits any execution issued against him <sup>Allowing execution to be unsatisfied.</sup> under which any of his chattels, land or property are seized, levied upon or taken in execution, to remain unsatisfied till within four days of the time fixed by the Sheriff or officer for the sale thereof, or for fifteen days after such seizure; subject, however, to the privileged

**SEC. 4.** claim of the seizing creditor for the costs of such execution and also to his claim for the costs of the judgment under which such execution has issued, which shall constitute a lien upon the effects seized, or shall not do so, according to the law as it existed previous to the passing of this Act, in the Province in which the execution shall issue.

Proviso as to costs.

The tendency of this clause is to prevent any undue preference between the creditors, and is wider in its application than the preceding subsection e, which refers to "procuring" a seizure. There is a clearly recognized distinction between procuring and permitting, (*in re Black v. Secor*, 1 B. R. 353; s. c. 1 L. T. B. 39, and other authorities cited in Bumps, p. 376.)

The English Statute of 1869, § 6, subs. 5, requires the levying of an execution for an amount not less than £50, and that only in the case of traders.

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When creditors may demand an assignment.

Form.

Affidavit required.

Creditors demanding assignment must elect a domicile.

**4.** If a debtor ceases to meet his liabilities generally as they become due, any one or more of his creditors for unsecured claims of not less than one hundred dollars each, and amounting in the aggregate to five hundred dollars, may make a demand upon him either personally or at his chief place of business or at his domicile upon some grown up person of his family or in his employ, (Form A.) requiring him to make an assignment of his estate and effects for the benefit of his creditors. But the said demand shall not be made until the creditor or creditors making the same shall have filed with the clerk or prothonotary of the court, in which the proceedings in liquidation (if any) will be carried on, his or their affidavit verifying his or their debt or debts, and that he or they is not or are not acting in collusion with the debtor, or to procure him any undue advantage against his creditors.

The creditor or creditors making such demand of assignment shall in such demand elect and appoint a domicile or domiciles, respectively, within the district or county in which such affidavit is filed, at which service of any answer, notice or proceeding may be served

on him or them; and the said clerk or prothonotary shall keep the original and give a certified copy to the creditor or creditors; and such copy shall be annexed to the notice served on the debtor.

SEC. 4.

FORM A.

INSOLVENT ACT OF 1875.

To (name  
of Insolvent.) residence and description

You are hereby required, to wit, by A. B., a creditor, for the sum of \$ (describe in a summary manner the nature of the debt,) and by C. D. a creditor, &c., to make an assignment of your estate and effects under the above mentioned Act, for the benefit of your creditors. And the said creditors A. B. and C. D. hereby elect their respective domicile for the purposes of this demand at . And said A. B., C. D., &c., have signed.

Place date

Signature of Creditor or Creditors.

INSOLVENT ACT OF 1875.

To (name, residence and description of Insolvent.)

Take notice of the foregoing demand, the original whereof has been filed in the office of the Clerk (or Prothonotary) of the Court, at on the day of A.D. 187 , and that the creditors named therein intend to proceed upon such demand according to the provisions of the said Act.

Place date

Signature.

"The word "debtor," applies of course only to the persons subject to this Act, traders or trading corporations. The first sentence of this section is somewhat similar to section 14 of the Act of 1869; but

+ "affidavit" - 39 Vic. ch 30. s 2.

**SEC. 4.** differs from it in requiring that the claim of any creditor joining in the demand shall not be less than \$100, and in permitting the personal service on the debtor to be made wherever he can be found, while the former statute seemed to restrict such service to "the county or judicial district wherein "the insolvent had his chief place of business."

**Notice.** The other clauses of the section are likely to have a beneficial tendency, but seem to want clearness at the close, in speaking of a notice to be served with the demand, while no such notice is elsewhere spoken of, apart from the demand, which is itself a notice, and apparently the only one required. However it might be considered that, as the original demand is not served, it is intended that a short notice, (v. form subjoined to Form A.) bearing the signatures of the creditors moving in the matter, should be appended.

The affidavit required of absence of collusion is in conformity with the following decisions :

**Collusion between bankrupt and creditor.**

An Act of Bankruptcy concerted between the bankrupt and the applying creditor will not support a fiat, (*ex parte Gouthwaite*, 1 Rose, 87; *ex parte Brooks*, 1 Buck, 257; *Bamford v. Baron*, 2 T. R. 594, n.; *Eyre v. Birbeck*, 2 T. R. 595, n.) But a creditor not privy to such concerted act might avail himself of it, (*ex parte Bourne*, 16 Ves. 145.) The bankrupt's agreeing to an act of bankruptcy at the suggestion of a friend, without any concert with the creditors was held to be no objection to the adjudication. (*Roberts v. Teasdale*, Peake, N.P. 27; *Simpson v. Sikes*, 6 M. & S., 295.) Although these decisions were rendered nugatory in England by the provisions of 12 & 13 Vic., c. 106, it is presumed that they will be followed in our practice. Edgar Ins. Act, 1869.

**Demand must be in good faith, and not merely to force payment.**

This demand must be undertaken in good faith for the purpose of placing the estate of the debtor in insolvency, and not merely as a means of enforcing payment of a debt. *Lacombe et al. v. Lanctot*, 16 L. C. Rep., p. 166. In this case Lacombe and another, creditors of Lanctot, demanded from the latter an assignment under "sec. 3, sub. sec. 2 of Insolvent Act of 1864," the terms of which were somewhat similar to those of the sec. under review. The latter by petition contested the demand, on the ground that the debt was a private one, that at the time of the demand he was doing business in partnership with another, that the partnership had not ceased to pay its liabilities, and that he had not ceased to meet his "commercial liabilities." In evidence it also was admitted by one of the creditors that the demand was made simply to enforce the *payment* of the claims of these two creditors. The Court held that these facts being proved, were sufficient to sustain the petition; and that this sec. did not

## SEC. 4.

permit creditors to use it as a medium of simply collecting debts. It was also evident that the demand was made in the belief that the petitioner would pay the claims by the fear of otherwise jeopardising the credit of the firm in which he was a partner.

In England mere stoppage of payment will not place the debtor in- *Mere stoppage.* voluntarily under the operation of the bankrupt law. Sec. 6 of Act of 1869. Lee, pp. 15 and 16. In France, all traders who cease making payment (*cesser paiemens*) become insolvent, and liable to be dealt with accordingly. Code de Commerce, amds. 1838, art. 437.

In this Act a middle course has been adopted. It neither denies a *Ceasing to meet liabilities.* presumption of insolvency by the stoppage of payment, nor treats it as conclusive proof. And while it enables creditors in such cases to prepare to put the estate under their control, in the event of insolvency, it also enables the debtor to relieve himself, by showing the stoppage to be temporary, and not produced by fraud or insufficiency of assets. *Vide § 5 post.*

The meaning attachable to the words of the Act may be partially gathered by reference to the following French authorities on the words cessation of payments—*cessation de paiemens*—in art. 437, Code de Commerce; 4 Pard. Droit. Coml. § 1101; 1 Bedarride des Faillitties, § 18. The Court will, in most of such cases, exercise its discretion as to whether the evidence laid before it establish a general stoppage of payment or not. Popham, p. 43.

In Ontario the question has arisen whether or not the wording of *Foreigners.* the Act entitles foreigners, having property in that province, to the benefit of its operation. But the Court refused to decide it, unless brought before them in another form than in that case. *Melton v. Nichols*, 27 Q. B. R. 167.

In England it has been questioned whether a person not residing or carrying on business there, can be adjudicated a bankrupt in an English Court. (*Ex parte* and *in re O'Loghlen*, 23 L. T. N. S. 878; 19 W. R. 459; and see *ex parte Harris*, *in re Binaconi*, 9 L. T. N. S. 847; *Hitchcock v. Sedgwick*, 2 Vern. 162.)

In the United States a resident alien may avail himself of the Act. (*In re Goodfellow*, 3 B. R. 452; S. C. 1 L. T. B. 179; S. C. 3 L. T. B. 69; S. C. Lowell, 510.)

In the Province of Quebec the fact of the debtor being a foreigner would not affect the question provided he traded there; and in like manner a foreigner might make the demand. *Quære*, as to trading corporations?

This section is of a similar nature to the clause in the United States statute, which provides for the issue of a compulsory writ when a person “being a bank, banker, broker, merchant, trader, manufac-

## SEC. 4.

turer or miner, has fraudulently stopped payment, or who, being a bank, banker, broker, merchant, trader, manufacturer, or miner, has stopped or suspended and not resumed payment within a period of forty days, of his commercial paper, (made or passed in the course of his business as such)."

And the following decisions in reference to this clause will be of use in regard to our own Act.

**Non payment of single piece of commercial paper.**

An allegation of the suspension of one piece of commercial paper makes out a *prima facie* case, and is sufficient. If there is any legal reason for the non-payment, it is for the debtor to show it before the Court. The petitioner need not, therefore, set forth by negative allegations all the particular circumstances which by possibility might show the non-payment to be within the meaning of the law. It is sufficient that a *prima facie* case is made upon the petition. (*In re Wilson*, 8 B. R. 396; s. c. 21 Pitts, L. J. 22; s. c. 5 C. L. N. 549; *in re Moses A. McNaughton*, 8 B. R. 44.)

A note given by one partner upon the dissolution of the firm on final settlement at the close of mercantile business, is not commercial paper. (*In re Christopher Weaver*, 9 B. R. 132.)

The non-payment of one piece of paper is not of itself suspension, for there may be a good reason for it. But when he fails to pay for want of means, and continues unable to pay, he has suspended within the meaning of the Act, although but a single check is shewn to have laid over unpaid for fourteen days. (*McLean v. Brown, Weber & Co.*, 4 B. R. 585; s. c. 2 L. T. B. 169; *in re Hercules Ins. Co.*, 6 B. R. 338; s. c. 5 L. T. B. 400; s. c. 16 I. R. R. 148; Bumps, p. 387 et seq.)

**Refusal to pay for cause, not cessation to meet liabilities.** If a man declines to pay, solely because he is not liable to pay, or because he has a valid claim against the paper, or a set-off, that is not a stoppage or suspension within the meaning of the Bankrupt

Act. (*In re Thompson & McClallan*, 3 B. R. 185; s. c. 1 L. T. B. 137; s. c. 2 Biss, 166; *in re Chandler*, 4 B. R. 213; s. c. Lowell, 478; s. c. 2 L. T. B. 170; *Bank v. Iron Co.*, 5 B. R. 491; s. c. 1 L. T. B. 272; s. c. 19 Pitts, W. J. 5; s. c. 3 C. L. N. 402; s. c. 28 Leg. Int. 317; *in re Charles S. Westcott et al.* 7 B. R. 285; *in re Mannheim*, 7 B. R. 342; s. c. 5 C. L. N. 149; s. c. 5 Pac. L. R. 226; s. c. 6 L. T. B. 94; s. c. 6 W. J. 72.)

A plea to a declaration on a promissory note, on equitable grounds, in bar to the further maintenance of the action, averring the pendency of proceedings commenced by plaintiff against defendant under the Insolvent Act of 1864, for the same cause of action subsequently to the declaration in the cause, was held a bad plea on demurrer. (*Baldwin v. Peterman*, 16 C. P. U. C. 310.)

**5.** If the debtor, on whom such demand is made, contends that the same was not made in conformity with this Act, or that the claims of such creditor or creditors do not amount to one hundred dollars each or to five hundred dollars in the aggregate, or that they were procured in whole or in part for the purpose of enabling such creditor or creditors to take proceedings under this Act, or that the stoppage of payment by such debtor was only temporary, and that it was not caused by any fraud or fraudulent intent, or by the insufficiency of the assets of such debtor to meet his liabilities, he may, after notice to such creditor or creditors, but only within five days from such demand, present a petition to the Judge praying that no further proceedings under this Act may be taken upon such demand, and, after hearing the parties and such evidence as may adduced before him, the Judge may grant or reject the prayer of his petition, with or without costs against either party; but if it appears to the Judge that such demand has been made without reasonable grounds, and merely as a means of enforcing payment under color of proceeding under this Act, he may condemn the creditor or creditors making it to pay treble costs.

The hardship of proceedings taken under the preceding section, maliciously and without proper cause, may be very great; and the power given the Judge of awarding treble costs, if it were the debtor's only remedy would, on the one hand, be very inadequate to deter malicious persons from resorting to this means of injury or extortion, and, on the other, afford but a poor satisfaction to the injured party. It is, therefore, not to be imagined that where such costs are awarded the debtor is debarred from subsequently instituting an action of damages; but before instituting such an action it would be incumbent upon the debtor to apply for and obtain stay of the proceedings complained of.

By the English statutes on the subject the Court seized of the debtor's application is empowered to award him satisfaction for the damages sustained in such a case.

It has been held, in appeal to the Court of Review at Montreal, that the *onus probandi* is on the petitioner to establish that his stoppage is only temporary, and that his assets were sufficient to

Judge may  
annual demand  
If claims do not  
amount to \$500,  
&c.

Or if stoppage  
be only tempo-  
rary.

Proviso as to  
costs.

Burden of proof  
on petitioner.

**SEC. 6.** meet liabilities, &c. (*McCready v. Leamy*, 11 L. C. Jur. 193.) In England it is the reverse. (*Ex parte Clay*, 1 Fonblanque, 212. Popham, p. 46.)

In the Province of Quebec, where any portion of the debt upon which the demand is based has been acquired from a third party, signification of such transfer must be made to the debtor prior to the making of the demand. (*In re Taillon & Turgeon et al.*, 13 L. C. Jurist, p. 19. C. C. Art. 1571).

The notice of application required by this section is one clear day when the party notified resides within fifteen miles of the place where the proceeding is to be taken. v. sec. 108, *post*.

**Examination of creditors demanding.** In Quebec it has been held that the creditors who make the demand cannot be examined in support; but the decision on this point was given on the Code of Civil Procedure (Art. 251), which will not, of course, apply to the other Provinces. (*Turgeon v. Taillon*, 13 L. C. Jur. 19.) Elsewhere in the Dominion, the rules of evidence to be followed will be those existing where the proceedings are taken. And therefore, in Ontario, it has been held that the creditor, or his agent, who swears to the debt for an attachment, may be a witness testifying to the facts constituting insolvency. 5 Prac. Rep. 10; Pop. p. 46.

**Delay for presenting petition.** The Court cannot allow the petition to be presented after the five days, not even when on affidavit it has been alleged that the neglect arose through an error on the part of defendant's attorneys, and that defendant had a good defence. (*May v. Larue*, 10 L. C. Jurist, 113. See also *ex parte Moorhouse, & Burland & Sache*, contestants. Court Review, Montreal, 30th June, 1868.) Popham, p. 45.

A petition by an insolvent to stay proceedings under the Act, made after the expiration of five days from the demand of an assignment, on the ground that the insolvent has executed a deed of assignment to an official assignee, is too late. (*Thomas dit Tranchemontagne and Martin*, 17 L. C. Jurist, p. 11.) See note to following section.

**Judge may enlarge time for contestation or assignment.**

**6.** If at the time of such demand the debtor was absent from the Province wherein such service was made, application may be made after due notice to the creditor or creditors, within the said period of five days, to the Judge on his behalf, for an enlargement of the time for either contesting such demand or for making an assignment; and thereupon, if such debtor has not returned to such Province, the Judge may make an order enlarging such period and fixing the delay within which such con-

testation or assignment shall be made ; but such enlargement of time may be refused by the Judge if it be made to appear to his satisfaction that the same would be prejudicial to the interest of the creditors. SEC. 8. Proviso.

This differs from the corresponding section (16) of the Act of 1869, in providing for enlarging the time for contesting the demand as well as for assigning.

The Act of 1869 required the contestation to be made after notice and within five days, sometimes an impossibility when the creditor and debtor resided far apart. In the present section there is an ambiguity as to whether the application must be made or only the notice given within the delay, but it would appear to be the application, which may now easily be done in all cases, as sec. four requires the creditor to elect a domicile in the district or county where the proceedings are to be carried on, and service of the notice may consequently be made at such elected domicile.

**7.** If such petition be rejected, or if, while such petition is pending, the debtor, without the leave of the Judge or otherwise than on the terms prescribed by him, continues his trade, or proceeds with the realization of his assets, or if no such petition be presented within the aforesaid time, and the debtor during the same time neglects to make an assignment of his estate and effects for the benefit of his creditors, as hereinafter provided, his estate shall become subject to liquidation under this Act.

When debtors estate to become subject to liquidation.

This section differs from the corresponding section of the Act of 1869, by providing for the debtor obtaining the Judge's leave to continue his business. The absence of a similar provision in the old Act was felt as a peculiar hardship in many cases ; for, even where the debtor had a good defence to the demand made upon him, he was obliged to cease doing business, or run the risk of having his whole estate attached under a writ of compulsory liquidation, if the claimant was at all reckless of consequences.

**8.** No such proceedings as aforesaid shall be taken under this Act to place the estate of an insolvent in liquidation, unless the same are taken within three months next after the act or omission relied upon as subjecting such estate thereto ; nor after a writ of attachment in

Time for commencing proceedings limited.

**SEC. 8.** liquidation has been issued while it remains in force ; nor after an assignment has been made under this Act.

A distinction must here be drawn between such acts of bankruptcy as are precise and terminal in their character as to time, and those that are continuous in their nature. These latter, so long as they exist, would afford good grounds for the proceedings in question, even though more than three months had elapsed since their incipience. The acts specified in clauses *b* and *f*, of section three, would probably be considered of this nature, and those in clauses *g*, *h*, and *i*, of the same section might or might not be so held according to the nature of the rule or order issued.

The non-payment of commercial paper at maturity, and the continued suspension and neglect of payment, are a continuous act of bankruptcy. The debtor, in such case, is in a state of suspension, and non-resumption of payment. His duty to pay is just as definite on any day after the day on which his commercial paper is by its terms payable, as it is on that day ; and on any such day he is in the very position, as between him and the creditors, of neglecting his duty, suspending, keeping in suspense, and not resuming payment. Whether his continued suspension and non-resumption of payment be termed a continuous act of bankruptcy, or be regarded as daily successive acts of bankruptcy, is not material. So long as it continues, the creditors may avail themselves of it as an act of bankruptcy, committed as truly within the preceding three months as on the day on which the debtor first violated his commercial obligation. (*In re Jacob Raynor*, 7 B. R. 527; *Baldwin v. Wilder*, 6 B. R. 85; contra, *Mendenhall v. Carter*, 7 B. R. 320;) Bumps, p. 386.

The act of bankruptcy relied upon must have been committed during the existence of the debt of the creditor making the application. (*Bailie v. Grant*, 9 Bing. 121; 2 M. & Scott, 193; *Moss v. Smith*, 1 Camp., 489; *Cowie v. Harris*, Moo. & M., 141.) The fact that the creditor has since obtained, by transfer, a judgment on a claim existing during the occurrence of the acts complained of, will not be sufficient. (*Bryant v. Withers*, 2 M. & S. 123; *Doria & Macrae*, 219.) If committed even on the same day that the application is made it will be sufficient. (*Ex parte Dufrène*, 1 Ves. & B. 51; *Hopper v. Richmond*, 1 Stark, 507.)

If the act of bankruptcy is a deed requiring registration, the delay for instituting proceedings will run from the date of registration. (*Thornhill v. Link*, 8 B. R. 521.)

In England, the limit is six months, Act of 1869, c. 6; in Scotland, four months, Murdoch, 223; in the United States, six months, 1867, 221.

## WRITS OF ATTACHMENT, &amp;C.

¶ Any creditor, upon his affidavit, or that of his clerk, or other duly authorized agent, that a trader is indebted to him in a sum proveable in insolvency of not less than two hundred dollars, over and above the value of any security which he holds for the same, and provided the affidavit or affidavits filed disclose such facts and circumstances as will satisfy the Judge or Prothonotary of the Superior or County Court, in the county, province or district, as the case may be, in which such trader has his chief or one of his principal places of business, that such trader is insolvent, and that his estate has become subject to liquidation under the provisions of this Act, and that he does not act in the premises in collusion with such trader nor to procure him any undue advantage against his creditors, (Form B) shall be entitled to a writ of attachment (Form C) against the estate and effects of such trader, addressed to the Official Assignee of the county or district in which such writ shall issue, requiring such Official Assignee to seize and attach the estate and effects of such trader, and to summon him to appear before the Court or a Judge thereof on a day therein mentioned, to answer the premises. Concurrent writs of attachment may be issued when required, addressed to the Official Assignee of other counties or districts in any part of the Dominion other than the county or district in which the same shall be issued. Such writs shall be subject as nearly as can be to the rules of procedure of the court in ordinary suits, as to their issue and return, and as to all proceedings subsequent thereto before any court or judge.

SEC. 9.

Affidavits by  
party demand-  
ing writ.

writ of  
attachment.

Form.  
Concurrent  
writs.

Procedure.

## FORM B.

## INSOLVENT ACT OF 1875.

CANADA,  
Province of }  
District of }

A. B\_\_\_\_\_, (*name, residence and description,*) Plaintiff,  
vs.

C. D\_\_\_\_\_, (*name, residence and description,*) Defendant.

I, A. B\_\_\_\_\_, (*name, residence and description,*) being duly sworn, depose and say:—

1. I am the Plaintiff in this cause (*or one of the Plaintiffs, or the clerk, or the agent of the Plaintiff in this cause duly authorised for the purposes thereof.*)

2. The Defendant is indebted to me (*or to the Plaintiff or as the case may be*) in the sum of                    dollars currency for, (*state concisely and clearly the nature of the debt.*)

[Note by Editor.—Alleged debt to be unsecured, or so much beyond value of any security held. See Secs. 8 and 9.]

3. To the best of my knowledge and belief the Defendant is Insolvent within the meaning of the Insolvent Act of 1875, and has rendered himself liable to have his estate placed in liquidation under the said Act; and my reasons for so believing are as follows: (*state concisely the facts relied upon as rendering the debtor Insolvent and as subjecting his estate to be placed in liquidation.*)

4. I do not act in this matter in collusion with the Defendant, nor to procure him any undue advantage against his creditors.

And I have signed; (*or I declare that I cannot sign.*)  
Sworn before me, this                                   .]  
  day of    187.

*and if the deponent cannot sign, add*  
—the foregoing affidavit having been  
first read over by me to the deponent.

**FORM C.**

## **INSOLVENT ACT OF 1875.**

No.

To the Official Assignee of the County (or Judicial District or Electoral District, as the case may be) of

## GREETING:

We command you at the instance of  
to attach the estate and effects, moneys and securities  
for money, vouchers, and all the office and business  
papers and documents of every kind and nature what-  
soever, of and belonging to  
if the same shall be found in (*name of district or other*  
*territorial jurisdiction*) and the same so attached, safely  
to hold, keep and detain in your charge and custody  
until the attachment thereof, which shall be so made  
under and by virtue of this writ shall be determined in  
due course of law.

We command you also to summon the said  
to be and appear before Us, in our Court  
for at in the County (or  
District) of on the day  
of to show cause, if any he hath, why his

**SEC. 9.** estate should not be placed in liquidation under the Insolvent Act of 1875, and further to do and receive what, in our said Court before Us, in this behalf shall be considered; and in what manner you shall have executed this Writ, then and there certify unto Us with your doings thereon, and every of them, and have you then and there also this Writ.

IN WITNESS WHEREOF, We have caused the Seal of our said Court to be hereunto affixed, at  
 aforesaid , this day of  
 in the year of our Lord, one thousand  
 eight hundred and seventy , in the  
 year of our Reign.

---

This section introduces several important changes. In the first place it assimilates the law in all the provinces, an unquestionable improvement, and at least one step however small towards a general assimilation of the laws of these Provinces as far as possible. An object which must be a desideratum with all having the prosperity of the Dominion at heart, and who take a large and patriotic view of the subject, and one which is now rendered more than ever desirable in view of the creation of the Supreme Court with an ultimate appellate jurisdiction.

The procedure indicated by this section more nearly resembles that hitherto in force in Quebec than in the other provinces, especially in requiring but one affidavit, that of the creditor, his clerk or agent.

This affidavit may be made before any of the officials mentioned in sec. 105, *post.*

A new limitation is introduced in requiring the affidavit to declare that the claim on which it is based is not less than \$200, *beyond the value of any security held by the creditor moving*, and also the declaration of absence of collusion; a declaration necessary where one object in view by the legislature is to do away with voluntary assignments; although, as stated in our preface, this object will probably be found a too violent reaction from the ultra facility hitherto afforded to assignments of this nature. It is not unlikely that it will eventually be found more desirable to adopt the rule followed in the United States of permitting these assignments, on the petition of the insolvent, for sufficient cause.

The procedure is also simplified and rendered less expensive, by SEC. 9. providing for the writ being at once addressed to the official assignee, without requiring the intervention of the Sheriff.

In the Province of Quebec the debt must be set out as in affidavits to hold to bail. v. 13 Rule of Prac. in Insol.

In entitling the affidavits, the names of the plaintiff and defendant Affidavits. should appear in accordance with the form 'in the schedule. (*Sharp & Secord v. Matthews*, 5 Prac. Rep. U. C. 10.)

The fact of the trading, as well as the act of insolvency, must be proved by the affidavits of two credible witnesses, in addition to the affidavit of the creditor, to support an attachment issued on the Act of Insolvency, created by sub-secs. 2, 3 and 4, of section three of Act of 1869. But this decision would seem in view of the wording of the present section to be without force at present. *Bagwell v. Hamilton*, 10 L. J. 305; C. C. Logie, Rob. & J. Dig. 410.

When one petitioning creditor applies and fails to proceed, it is not if creditor fail competent for another creditor to apply for adjudication on that petition. (*In re Bristow*, 3 L. R. Chy. 247).

A creditor issuing an attachment under the Act of 1864, cannot, after five days from the return day of the writ, withdraw the attachment so as to prevent another creditor from intervening for the prosecution of the cause. *Worthington v. Taylor*, 10 L. J. 333; C. C. Logie (Rob. J. Dig. 411.)

A limited company can maintain a petition in bankruptcy for an joint stock Co. adjudication, and the secretary of the company can make the necessary oath. (*In re Calthorp*, 3 L. R. Chy. 252.)

A trader having ceased to meet his liabilities, a demand was served on him on the 31st January, requiring him to make an assignment. On February 6th (the 5th being a Sunday), an order was granted for an attachment, which issued. One of the affidavits filed on application for the attachment was sworn to on February 4th. On an application to set aside the writ and all proceedings for irregularity, it was considered:—

1. That the order for the issuing of the writ was not made too soon.
2. That it was immaterial that one of the affidavits was made within the five days allowed for petitioning under sec. 3, sub-sec. 3, Insolvent Act of 1864, or for making an assignment in accordance with the demand.
3. That the writ of attachment should have been endorsed with a statement that the same was issued by order of the Judge of the County Court; but an amendment was allowed on payment of costs by plaintiffs. (*McInnes v. Brook*, 1 L. J. U. C. (N. S.) 162.)

**SEC. 9.** The first of these rulings does not, at first sight, appear to be in accordance with the provisions of the act. The ruling at Montreal, *in re Clark & Co. & Shaw & Davis*, 1870, appears sounder, where it held that a petition presented on the sixth day after the demand, where one of these days was a Sunday, was in time. v. 12 Rule of Prac. in Insol., Q.

**Who a creditor.** The question of what will make a person a creditor within the meaning of this section is not without difficulty, even when examined by the light of clause *h* of the interpretation section (No. 2).

**Unliquidated damages.** Unascertained damages claimed against an insolvent for a tort cannot be the debt relied on by an applying creditor.

The debt must not be a claim for damages, unless ascertained and fixed by judgment; therefore interest, even on a bill of exchange, cannot be the subject of an applying creditor's debt, unless expressed to be payable upon the face of the instrument, and it cannot be added to the principal to make up the amount required to constitute the creditor's debt. (*Cameron v. Smith*, 2 B. & A., 305; *ex parte Greenway*, Buck, 412; *ex parte Burgess*, 8 Taun. 660; 2 Moore, 745.)

**Interest.** The portion of this dictum which refers to interest on commercial paper would not be considered sound law in Quebec; for cap. 64 of the Consolidated Statutes of that Province provides that such paper shall bear interest from the last day of grace.

**Equitable debt.** It would seem to be a question whether the debt of the applying creditor must not be a debt, for which, if payable at the time, an action at law could be maintained by and in the name of the creditor; and whether an equitable debt is sufficient, (*ex parte Hawthorne*, Mont. 132) although such a debt may certainly be proved under bankruptcy. The obligation to pay a sum of money under an order of a court of Equity, although placed for some purposes on the same footing as a judgment at law, is not a sufficient petitioning creditor's debt; (*ex parte Blencowe*, 1 L. R. Ch. 393). It has been held that the assignee of a bond could not be an applying creditor within the meaning of the English Act, (*ex parte Lee*, 1 P. W. 782; *Medlicot's case*, 2 Str. 899; *ex parte Sutton*, 11 Ves. 163.)

**Transferred debt.** But *semble* in the Province of Quebec, that if signification of the transfer be previously given, proceedings would lie, (*Lacombe v. Lanctot*, 16 L. C. Jurist, 166.)

**Prescribed debt.** A debt barred by the Statutes of Limitation (prescribed) is insufficient, (*Quantrock v. England*, 2 W. Bl., 703; *ex parte Dewdney*, 15 Ves. 479; *Mavor v. Payne*, 3 Bing. 286; and in the United States, *Cornwall v. Cornwall*, 6 B. R. 305; s. c. 6 A. L. Rev. 365); so is a debt found upon an illegal consideration, (*Wells v. Girling*, 1 Brod. and B. 417.)

**SEC. 10.** A sum awarded by arbitrators may constitute a good petitioning creditor's debt, (*Dawes v. Holdsworth*, Peake, 64) unless the award be bad on its face, or the submission void, (*Antrim v. Chase*, 15 E.A. 209, 1 Ro. 344; *Dutton v. Morrison*, 17 Ves., 193.)

In Ontario, a creditor, whose debt is unmatured, may commence proceedings against his debtor, who is insolvent, in like manner as he might have done if his debt had been overdue at the time. But in a case where it appeared that the debtor did not owe more than \$100 beyond the creditor's debt, none of which was at the time due, the Court directed that he should be allowed further time to shew, if he could, that he was not in fact insolvent, and so not liable to have his estate placed in compulsory liquidation, (*in re Moore v. Luce*, 18 C.P. U. C. 446; v. 13 L. C. Rep. p. 113.)

It would seem that in the Province of Quebec the same rule would be followed, for, anterior to the insolvent law, writs of attachment could be taken against the person and property of debtors on unmatured claims. (*Sinclair v. Ferguson*, and *Robertson v. Ferguson*, 8 L. C. Rep. 239; *Leduc v. Tourigny*, 5 L. C. Jurist, 123.)

In the United States, a creditor whose debt is not due may become a petitioner. It is a proveable debt, and therefore sufficient to maintain a demand. (*Linn v. Smith*, 4 B. R. 46; s. c. 1 L. T. B. 299; s. c. 3 L. T. B. 218.)

The debt of a surety is sufficient to support a demand against him. **Debt as surety.** (*Heylor v. Hall*, Palm, 325; *Eden*, 43.)

Two persons exchanged acceptances, and before the bills matured one committed an act of bankruptcy; it was held that there was not such a debt due from him to the other as would sustain a commission before the other had paid his own acceptance. (*Sarratt v. Custin*, 4 Taun., 208; 2 Ro. 112.)

**10.** The service of a writ of attachment issued against a debtor under this Act, may be made upon him as provided for the service of an ordinary writ of summons in the Province where the service is to be made, and if such debtor remains without such Province, or conceals himself within such Province, or has no domicile in any Province of the Dominion, or absconds from his domicile, in every such case service shall be made by such notice or advertisement as the Judge, or in the Province of Quebec the Judge or Prothonotary, may order.

Concurrent writs of attachment issued against a debtor may be executed without being previously served upon

**Award of arbitrators.**

**Service of concurrent writs.**

**SEC. 11.** him, except in cases where such debtor has his domicile or a place of business in the county or district in which the same is to be executed, when the writ may be served at such domicile or place of business.

**Constructive service.**

The order for constructive service will issue on a summary petition based upon the return of the officer charged with the execution of the writ, or on the original or a supplementary affidavit of the creditor, his clerk or agent, or the affidavit of any third person, establishing the facts required.

A Judge in insolvency has power to rescind an order made by him for constructive service of a writ of attachment (*Eaton v. Shannon*, 17 C. P. U. C. 592).

When a trader in Ontario becomes insolvent, and an attachment in insolvency is issued to the sheriff of the county in which he resides, the County Court Judge has jurisdiction to issue another attachment to the sheriff of any County in Canada in which the insolvent has property. (*In re Beard*, 15 Grant, 441).

**Return of writ.**

**11.** Writs of attachment shall be made returnable forthwith after the execution thereof. And immediately upon the receipt of a writ of attachment issued under this Act, the Official Assignee shall give notice of the issuing thereof by advertisement (Form D).

**Notice of issue.**

#### FORM D.

#### INSOLVENT ACT OF 1875.

A. B.,  
Plaintiff.

C. D.,  
Defendant.

A writ of attachment has issued in this cause.

(Place                    date.)

(Signature,)  
Official Assignee.

The object of this notice is to prevent third parties from disposing of any portion of the estate which may be under their control.  
Abbott on Ins. Act, 1864.

No period is fixed during which the publication of this notice shall be continued. It would probably be sufficient to publish it as provided in s. 101 for notices of meetings; but in some cases publication in a local paper would also be desirable. To obviate doubts a rule of practice might advantageously be made in reference to this notice.

**12.** The Official Assignee by himself or by such Deputy (which word shall in this Act include Deputies,) as he may appoint shall, under such writ of attachment, seize and attach all the estate, property and effects of the Insolvent, within the limits of the county or district for which he is appointed, including his books of accounts, moneys, securities for moneys, and all his office or business papers, documents, and vouchers of every kind and description ; and shall return with the writ a report under oath stating in general terms his proceedings on such writ.

V. 21 Rule of Prac. P. of Q.

**13.** If the Official Assignee or his Deputy, is unable to obtain access to the interior of the house, shop, store, warehouse or other premises of the Insolvent named in the writ, by reason of the same being locked, barred, or fastened, such Official Assignee or Deputy is hereby authorized forcibly to open the same in the presence of at least one witness, and to attach the property found therein.

#### ASSIGNMENTS AND PROCEEDINGS THEREON.

**14.** A debtor on whom a demand is made by a creditor or creditors who has or have filed the affidavit required, ~~or against whom a writ of attachment has issued,~~ as provided by this Act, may make an assignment of his estate to the Official Assignee appointed for the county or district wherein he has his domicile, or wherein he has his chief place of business, if he does not reside in the country or district wherein he carries on his business ; and in case there is no Official Assignee in the county or district where he resides or wherein he carries on his business, then to the Official Assignee for the nearest

# 39 See: ch 30. § 3.

SEC. 14. adjoining county or district; but such assignment ~~or writ of attachment~~ may be set aside or annulled by the court or judge for want of, or for a substantial insufficiency in, the affidavit required by section four, ~~or by section nine~~, on summary petition of any creditor to the amount of not less than one hundred dollars beyond the amount of any security which he holds—of which petition notice shall have been given to the debtor and to the creditor who made the demand of assignment ~~or who issued the writ of attachment~~, within eight days from the publication of the notice thereof in the Official Gazette.

To whom  
should Act  
apply.

The question of who may take advantage of the insolvent laws to free himself from further liabilities to his creditors is one of the most difficult and delicate with which the legislator has to deal. On either hand a danger threatens as the result of what may be enacted. On the one side, too great an extension of the right places in the hands of the fraudulent debtor a weapon which may be wielded to the great and manifest injury of his creditors, and this has been constantly felt under the Act of 1869. On the other, over stringent regulations are likely to be so cumbrous in working as to often be inefficacious, and either enable the debtor to make away with his property, or furnish the creditors with a means of extortion, by withholding their assistance in placing the estate in insolvency.

The present Act differs on this point both from the Act of 1864 and that of 1869. The former, before it was amended, required a resolution of a general meeting of the insolvent creditors to enable him to assign; the latter threw the doors open to all. The present attempts to steer a middle course; whether the result will be successful will soon be seen in its working. Hitherto the great obstacles in satisfactorily applying the principles of the insolvent statutes have been, 1st the apathy of the creditors, engendered often from the little control they had over the estate in the earlier stages of insolvency, 2nd, the difficulty and delay encountered in working the act, principally owing to the absence of a special bankrupt court, a want not removed by this act, and which, as long as it exists, it is to be feared will seriously impede the working of any statute on the subject.

Assignment  
should be ac-  
cepted by assig-  
nee.

It was held under the voluntary assignment clause of the acts heretofore in force, that the assignment was not valid unless accepted by the Assignee, *Yarrington v. Lyon*, 12 Grant, 308; but it is doubtful whether the same rule would be applied under the section, for by the

present act the character of the interim assignee is made more an SEC. 14.  
official and public one than heretofore, and even the assignment pro-  
vided for by this section is involuntary to a great extent.

The question has arisen in the Courts of Ontario, whether an Insolvent, who has no estate, can partake of the benefit of the act. It arose without estate. incidentally in Smith, Insolvent, upon an appeal against his discharge, by Darling, a creditor. Adam Wilson, J. held there was an estate, but remarked,—“ What conclusion he might have formed as to the validity of an assignment where there was no estate he was not prepared to say.” 4 Prac. Ct. Rep. 89. *In re W. Perry*, an insolvent, S. J. Jones, J. held that a discharge may be obtained where the Insolvent has made an affidavit that he has no estate to assign. L. Jor. 1866, p. 75.

In the Courts of Quebec, the books do not show that this point has been raised. But we are aware that Insolvents who had no estate to assign, have obtained a discharge from the Courts, under the act of 1864, in cases where a deed of discharge had, and also where it had not been given, by the creditors. Pop. p. 21.

This question cannot be considered very materially altered by the changes made by the present act in reference to composition and discharge; but ampler power is given to the court or judge in dealing with it, see secs. 49 *et seq.*, and especially section 53, which provides for the suspension or refusal of the discharge where the estate will not pay thirty three cents on the dollar.

A petition calling in question the validity of an assignment Petition questioning assign-  
under the Act, must be served upon the insolvent as well as upon the ment must be  
Assignee. (*In re Gravel and Stewart, and Vilbon* Ptr. 17 L. C. served on  
Jurist, p.)— assignee.

—An assignment under the Act by one member only of a co-partnership Assignment by  
cannot operate as an assignment of the Partnership Estate. one partner.  
(*Cournoyer vs. Tranchemontagne et al*, and *Barthe int. party*, C. of  
R. 18 L. C. J. p. 335.)

**15.** The assignment mentioned in the next preceding Form of assign-  
section may be in the form E; and in the Province of ment.  
Quebec the deed of assignment may be received by a notary in the authentic form.

## SEC. 16.

## FORM E.

## INSOLVENT ACT OF 1875.

This assignment made between \_\_\_\_\_ of the first part, and \_\_\_\_\_ of the second part, witnesses,

(or)

On this \_\_\_\_\_ day of \_\_\_\_\_ before the undersigned notaries came and appeared of the first part, and of the second part, which said parties declared to us notaries :—

That under the provisions of "The Insolvent Act of 1875" the said party of the first part, being insolvent, has assigned and hereby does assign to the said party of the second part, accepting thereof as Assignee under the said Act, and for the purposes therein provided, all his estate and effects, real and personal, of every nature and kind whatsoever.

To have and to hold to the party of the second part as Assignee for the purposes and under the Act aforesaid.

In witness, whereof, &c.

(or)

Done and passed, &c.

By sec. 7 of the act of 1869, this instrument in the provinces, other than Quebec, was required to be in duplicate; and this method should probably still be followed.

It was provided by sec. 115 of the act of 1869 that "all deeds of assignment, &c., shall be executed in the manner in which deeds are usually executed in the province wherein such deeds shall respectively bear date," and under that section it has always been considered that in the Province of Quebec they should be executed before a notary.

Effect of assignment.

**16.** Whenever an Insolvent shall have made an assignment, and in case no assignment shall have been made, but a writ or concurrent writs of attachment shall have

issued as provided for by this Act, such assignment or such writ or writs of attachment, as the case may be, shall vest in the Official Assignee of the county or district wherein the same shall have issued, all right, power, title and interest which the insolvent has in and to any real or personal property, including his books of account, all vouchers, letters, accounts, titles to property and other papers and documents relating to his business and estate, all moneys and negotiable papers, stocks, bonds and other securities, and generally all assets of any kind or description whatsoever which he may be possessed of or entitled to up to the time of his obtaining a discharge from his liabilities, under the same charges and obligations as he was liable to with regard to the same ; and the Assignee shall hold the same in trust for the benefit of the Insolvent and his creditors, and subject to the orders of the court or judge ; and he may upon such order and before any meeting of the creditors, institute any conservatory process or any proceeding that may be necessary for the protection of the estate ; he may also, upon such order, sell and dispose of any part of the estate and effects of the Insolvent which may be of a perishable nature : such assignment or writ or writs of attachment shall not however, vest in the assignee such real and personal property as are exempt from seizure and sale under execution, by virtue of the several Statutes in that case made and provided in the several Provinces of the Dominion respectively, nor the property which the Insolvent may hold as trustee for others.

The spirit of this section is that all property and every beneficial interest which the insolvent personally has shall, with certain specific exceptions, be vested in the assignee for the benefit of his creditors. It differs somewhat from the corresponding section (No. 10) of the act of 1869, and especially by the insertion of the important modifying clause "under the same charges and obligations as he (the insolvent) was liable to with regard to the same."

Moneys seized, by a judgment creditor of the Insolvent, prior to the assignment, but at the time of the assignment pending in Court, are vested in the assignee, to be divided among the creditors generally according to the provisions of the Act, subject to the seizing creditor's

Conservatory proceedings.

Certain property excepted from seizure.

All property in which insolvent has a beneficial interest to be vested in assignee.

Moneys under seizure.

**SEC. 16.**

lien for costs, see sec. 83, *post*, and consequently the case of *Bacon v. Douglas, and Converse Ass.* 15 L. C. Rep. 456., is no longer a precedent.

**Proceeds of property sold under execution.**

When a sale has been had under an execution against a judgment debtor, who afterwards made an assignment, the proceeds of the sale are not vested in the assignee, but go to the creditor. *Brand v. Bickell*, Upper Canada Law Jour. p. 95., but subject to the plaintiff's lien for costs, see sec. 83 *post*.

**Execution irregularly issued.**

"Where a writ of *f. i. fa.* issued on judgment on a specially endorsed writ before the expiration of eight days from the last day for appearance it was held to be irregular; and the defendant having made a voluntary assignment five days after the issue of the writ, the assignee succeeded in setting aside the execution with costs, (*Randal v. Bowman*, 1 L. J. U. C. (N.S.) 158.) This case was decided under the Act of 1864; and does not touch the question whether after a *sale* under such an irregular execution, even since the passage of the amending Act of 1865, sec. 13, or after payment over of the proceeds since this Act, the assignee could secure for the general creditors the proceeds of the sale, as against the execution creditor.

"Where a final judgment in default of appearance to a specially endorsed writ was entered on 23rd January, and execution issued on 30th of same month, and a writ of attachment under the insolvent Act issued on 3rd February, an application on 28th March, at the instance of the official assignee, to set aside the judgment, as irregular for a defect in the affidavit of service, was held to be too late" (*Dunn v. Dunn*, 1 L. J. U. C. (N.S.) 239.), Edgar 1869 p. 61.

**Law suits suspended.**

The assignment suspends law suits pending by or against the Insolvent. After the assignment the Assignee may move in any suit for the suspension of the proceedings, until after he can formally appear therein, to prosecute or defend it, in his official capacity. *In appeal, Burland v. Larocque*, 12 L. C. Jur. 292.

"These provisions remove to a great extent the opportunity for the preferential judgments so frequently given by debtors in insolvent circumstances. An equal distribution of the estate of an insolvent is the aim of these laws, and this object could scarcely be accomplished so long as it was in the power of a bankrupt to give disgraceful preferences by allowing a favored creditor to obtain a judgment by default, and secure priority of execution.

"The necessity for this change which was also found in the statute of 1869, was shewn in a striking manner by the decision in *Thorne v. Torrance*, 16 U. C., C. P. 445 (affirmed on appeal, 18 U. C., C. P. 29). In that case certain debtors executed a deed of assignment for

payment of creditors, but not in accordance with the Act of 1864. SEC. 16. Thorne subsequently to this deed issued a writ of execution against the debtors, and then himself took proceedings in insolvency against their estate for the general benefit creditors. It was held that the assignment was an act of bankruptcy and void, and therefore the execution plaintiff, although also petitioner in insolvency, could enforce his execution against the debtors of the estate to the postponement of the rest of the creditors. This decision was followed in *Rose v. Brown*, 16 U. C. C. P. 477." Edgar 1869, p. 61.

The lien of a vendor for unpaid purchase money attaches to the Vendor's lien. land in the hands of the assignee in insolvency of the purchaser, (*Van Wagner v. Findlay*, 14 Grant, 53; *Mitford v. Mitford*, 9 Ves. 100; *Grant v. Mills*, 2 Ves. & B. 306; *Chapman v. Tanner*, 1 Vern. 267) and in Quebec he has his *bailleur de fonds* claim.

It is probable that the general jurisdiction of the Court of Chancery Trustees, bank in all matters relating to trusts would place it in the power of that appointment of Court to appoint a new trustee in case of the bankruptcy of a former new. one; although it was thought necessary to clothe the Court in England with that power by statute, (6 Geo. IV. c. 16, s. 79; 12 & 13 Vic. c. 106, s. 130). These provisions, however, do not render it imperative on the Court to remove a trustee from the trust upon his bankruptcy; but he will be removed if his bankruptcy in the smallest degree endangers the trust. (*In re Bridgman's Trust*, 6 Jur. (N.S.) 1065). In case of the bankruptcy of a trustee the Court of Chancery may appoint a receiver to act in his stead, (*ex parte Ellis*, 1 Atk. 101; *Langley v. Hawke*, 5 Mad. 46.)

Property which has been placed in the hands of a man for a specific purpose will not pass to his assignee upon his bankruptcy. As where bills of exchange were remitted to bankers in London with permission to discount them for a particular purpose, and they were not in fact discounted before the bankruptcy of the banker to whom they were remitted, but carried to account, the property was held to remain in the party making the remittance, (*Thompson v. Giles*, 2 B. & C. 422; *ex parte Frere*, Mo. and M. 263). Also, where a bankrupt was allowed by his assignees to remain in possession of his house and furniture, in order to assist in settling the affairs of the bankrupt estate, and the bankrupt traded and became bankrupt a second time, it was held that the furniture, &c., still remained the property of the assignees, under the first commission, and did not pass under the second assignment, (*Walker v. Burnell*, Doug. 317, and see *Mullen v. Moss*, 1 M. & S., 335).

**SEC. 16.** Trust funds were invested in the purchase of transferable shares in a banking company, in the name of one of the trustees, who executed <sup>Shares in joint stock company held by trustee</sup> a declaration of the trusts thereof (the rules of the company not allowing shares to stand in the names of joint owners or *cestuis que trustent*.) The trustee was also a proprietor of shares in his own right in the same company and made various sales and purchases of shares therein. There was nothing to distinguish which were the individual shares held by the different proprietors, the same being in the nature of a capital expressed by quantity. The trustee contracted to assign a certain number of shares to the banking company as a security for advances which they made to him; he afterwards became bankrupt. It was held, that the trustee must be presumed to have transferred or pledged such shares as belonged to himself, and so far as he had shares of his own, not to have transferred or pledged the shares of his *cestuis que trustent*. That therefore the *cestuis que trustent* were entitled to so many of the shares standing in the name of the trustee at the time of his bankruptcy as could be presumed to be identical with the shares in which the trust funds were invested, from the fact that such a number of shares had always thenceforward stood in the name of the trustee. That the equitable title of the *cestuis que trustent* to the shares purchased with the trust funds was perfected without notice to the banking company, by the execution of the declaration of trust thereof, (*Pinkett v. Wright*, 2 Hare, 120; 12 L. J. Ch. 119.)

**Mixture of trust with private funds.** If a trustee mixes a trust fund with money of his own, as long as the mixed fund remains under his control, either in its original shape, or in such substituted form that it can be traced, it is primarily liable to answer the trust. Therefore where a man, on the verge of bankruptcy, made out of a mixed fund of his own and trust moneys, payments to creditors, but without any fraudulent preference, the owners of the trust moneys were held entitled, as against the assignees in bankruptcy, to recover the value of their property out of the remainder of the mixed fund found in the possession of the bankrupt in an altered form, but sufficiently marked; and it seems that the decision would have been the same even if the payments by the bankrupt had been fraudulent preferences, as the money forming his share of the mixed fund was at his disposal at the time those payments were made, and would, therefore, for this purpose be looked on as his own moneys, (*Frith v. Cartland*, 11 Jur. (N. S.) 238; 34 L. J. Ch. 301; 13 W. R. 493; 12 L. T. (N. S.) 175.)

**When trust fraudulent property to pass to assignee.** Under previous statutes it was well established that property held by the bankrupt as a trustee did not pass to the assignees, although assignee.

## SEC. 16.

such property might come literally within the sections, as to order and disposition, corresponding to the 5th clause of this section, unless the trust were created for the mere object of concealing who was the beneficial owner, or otherwise not *bona fide*, (*Caffrey v. Darby*, 6 Ves. trusts. 496; *Copeman v. Gallant*, 1 P. W. M. S. 314; *ex parte Smith, in re Manning*, 4 Dea. & C. 579; *Joy v. Campbell*, 1 Sch. & L. 328.) Where, however, a trust of property was created in order to conceal who was the beneficial owner of it, such property became divisible among the creditors upon the bankruptcy of the trustee. By the rules of an insurance company, no person, except a director, was permitted to hold more than two shares in his own name; but no rule prevented a person from being beneficially entitled to more than two shares, by holding them in the name of another party. A proprietor, who was already the holder of two shares, having purchased two others, caused them to be entered in the name of the bankrupt in the company's books, with the knowledge of one of the directors and the actuary. The bankrupt signed a declaration of trust, that he held the shares as trustee for the proprietor; but no notice of the trust was taken in the books of the company, and the bankrupt held the certificate of the shares, and continued to receive the dividends thereon, accounting for them from time to time to the proprietor up to the period of his bankruptcy, when the shares were still standing in his name; during all which time he was treated as owner by the company, had notice of meetings served upon him, attended meetings of the shareholders, and voted as a shareholder. It was held, that the shares were in the order and disposition of the bankrupt, as reputed owner; *ex parte Burbudge*, 1 Dea. 131, reversing the decision reported; *sub nom. ex parte Watkins*, 4 D. & Ca. 87; 1 M. & A. 689.

By the rules of a joint-stock company, only principals could become subscribers. The petitioner purchased forty shares in the name of the bankrupt, who verbally declared that he held them as a trustee for the petitioner, and the certificates of the shares were kept in the possession of the petitioner; but no notice was given to the company of the trust, nor did the bankrupt sign a written declaration of trust, until seven days before the fiat was issued: it was held, that the shares were in the order and disposition of the bankrupt, as reputed owner, and passed to his assignees; *ex parte Orr*, 1 Dea. 166; 2 Mo. & 724. These cases were, however, decided when there did not exist an express enactment that property held by the bankrupt in trust for any other person should not be divisible among his creditors; and it seems probable that the introduction of such an enactment by the first clause of this section may enable persons, in some cases, to

- SEC. 16.** evade the operation of the 5th clause of this section, which relates to property in the order or disposition of the bankrupt.

**Goods on commission do not pass to assignee.** Under the sections of the Acts of 1864 and 1869, which contained similar provisions to the present one, it was held in Quebec:—1st. That goods deposited with a firm, to be sold on commission, are properties held for the benefit of another, and therefore on the insolvency of such firm, they do not vest in the assignee;—and,

2ndly. That such goods cannot be detained from the owner by the assignee, though they had been seized by the landlord for rent, prior to the issue of the attachment in insolvency, and he had filed a claim with the assignee, asserting his lien for unpaid rent, (*Lawlor v. Walker*, 17 L. C. Rep. 349).

The Court therefore treated the merchant, entrusted with the sale of the goods on commission, as a trustee, under those sections of the former Acts, (Pop. p. 71).

The owner of goods may, under such circumstances, reclaim them by petition to the Judge, in a summary manner, according to § 125 post.

**Insolvent may maintain suit in certain cases.** Although, in England as here, all the property acquired by the bankrupt up to the time of his discharge passes to his assignees, as well as the right of action respecting it, he may there maintain a suit for his personal labour performed after the issuing of an assignment, (*Chippendale v. Tomlinson*, Cook, 428; *Silk v. Osborne*, 1 Esp. 140; *Williams & Chambers*, 11 Jur., 798); and he may sue upon after acquired property, or on a contract, unless the assignee interferes, (*Webb v. Fox*, 7 T. R. 391; *Fowler v. Down*, 1 B. & P. 44; *Evans v. Brown*, 1 Esp. 170; *Leroche v. Wakeman*, Peake, 190); or sue upon a contract made with him, (*Cumming v. Roebeck*, Holt, 172); unless the assignees interfere (*Kitchen v. Bartsch*, 7 East, 53; *Herbert v. Sayer*, 2 Dow. & L. 49).

**Property of foreigner insolvent.** The plaintiff had been engaged in business in Canada, though not permanently resident there. He was arrested by defendant, a constable, who took possession of money found on him, and being discharged, he sued the defendant for the money; a writ of attachment having issued against him, one M. was appointed Official Assignee, and applied, under Sec. 4 sub. s. 9 of the Insolvent Act of 1864, to be allowed to intervene and represent the Plaintiff in the suit. The plaintiff objected, contending that as a foreigner he was not liable to the insolvent laws. The point being one of great practical importance raised for the first time, the Court with a view to have it properly brought up, left the Assignee to sue the defendant for the money so that the defendant might apply under the Interpleader Act, and the question be represented on the record in a feigned issue. (*Mellon vs. Nichols*, 27 Q. B. 167.)

## SEC. 16.

By sec. 39 of this Act, the insolvent, if he shall sue out "any writ," before he obtains a discharge, must give to the opposite party security ~~Must give security for costs.~~

A customer deposited with a banker two bills of £1,000, endorsed by him, for the amount of which it was agreed he should draw, the change on ~~bills of ex-  
bankers refusing to discount them. The customer only drew for £65,  
and the bankers employed a broker to discount the bills, and became  
bankrupt in less than three weeks after they were originally deposited  
with them by the customer; it was held, that the customer was  
entitled to the proceeds of the bills, (*ex parte Edwards*, 2 M. D. &  
D. 625)..~~

Where money is paid by A. to B., to be applied by the latter, pursuant to a binding contract between the parties, A. cannot revoke its destination. An act done in performance of a binding contract is not revocable. In ordinary cases, where a man is bound to pay money on a given day, a payment made before the day is not revocable. The drawer of an accommodation bill, a few days before it was due, voluntarily, and not in contemplation of bankruptcy, gave to the acceptor money wherewith to pay the bill. Before the bill was due the drawer became bankrupt, and his assignees sued the acceptor for the amount of the bill, as for money had and received to their use: it was held that the action was not maintainable, as the authority to apply the money in payment of the bill, having been conferred by the drawer upon the defendant, in performance of his implied contract to indemnify, was irrevocable, (*Yates v. Hoppe*, 9 C. B. 541; 14 Jur. 372; 19 L. J. C. P. 180. See *Walker v. Rostron*, 9 M. & W. 411).

A manufacturer, A., proposed to a firm of B. & C., who were the home agents of A.'s foreign consignees, that they should make to special payment advances to him against the consignments, and that "the proceeds of sales above the advances," should go to the liquidation of an old claim of B. & C. against A. B. & C. assented to this arrangement by a letter which, after stating that there were two ways of making advances—one for A. to draw on B. & C., and take their acceptances, and negotiate them; the other, for B. & C. to advance cash to A. and draw on A. for the amounts, A. to accept, and B. & C. to negotiate concluded thus: "and we shall retire that acceptance from proceeds of the sales." In pursuance of this arrangement, A. directed his consignees to remit to B. & C., and B. & C. made advances to A. by drawing on him, negotiating his acceptances, and remitting the proceeds to him. Afterwards B. & C. being in want of money, directed the consignees to remit not to themselves, but to a firm of bankers, C. & D., (having a common partner with themselves) as a security for advances made by C. & D. to B. & C. Upon B. & C. becoming bank-

**SEC. 16.** rupt it was held, that C. & D. had notice of the arrangement between A. and B. & C., through the fact of the common partner; and that upon the construction of the contract, the remittances in the hands of C. & D., were appropriated in equity, first, to the payment of A.'s acceptances, and subject thereto to the discharge of the old claim, (*Steele v. Stewart*, L. R. 2, Eq. 84. See *ex parte Brooke, in re Hammond*, 17 L. R. 665; 20 L. T. N. S. 547).

**Money against which bill of exchange had been drawn.** The plaintiffs purchased from the N. Bank a bill of exchange, drawn on the L. Bank, upon the faith of representations by the N. Bank that they had funds in the L. Bank, out of which the bill would be paid at maturity; but soon after the purchase, the N. Bank having stopped payment (without any proceedings in bankruptcy) the L. bank refused to accept or pay the bill, although they had ample funds of the N. Bank. It was held, that the plaintiffs were entitled to payment out of those funds, the money having been paid on the faith of the representation; but upon appeal it was held that the funds had not been specifically appropriated to meet the bills, and that the plaintiffs were not entitled, (*Thompson v. Simpson*, 18 W. R. 1090; reversing L. R. 9 Eq., 497; 18 W. R. 964; see *Farley v. Turner*, 26 L. J. Ch., 710; *in re Barned's Banking Co., ex parte Massey*, 22 L. T. (N. S.) 853.

**Dividend warrants entrusted to stock brokers do not pass to their assignee.** Dividend warrants on which the bankrupts in the character of stock brokers were entrusted to receive the dividends, and which they had pledged for their own debt, were ordered to be delivered up to trustees who had employed the bankrupt as their broker, (*ex parte Gregory*, 2 M. D. & D., 613).

**Securities of third persons held by partner cannot be pledged by firm even if partner might have done so.** A trustee, with the consent of his *cestui que trust*, pledged Madras government notes, held by him in trust for the benefit of a firm of which he was a partner. The notes were afterwards redeemed and delivered to the firm. Subsequently the firm, without the consent of the *cestui que trust*, pledged them for a similar purpose. The firm being insolvent and bankruptcy imminent, the trustee redeemed the notes with partnership assets, indorsed them to himself personally, and replaced them in his private chest. The firm became bankrupt, and it was held, that the notes, which had been set apart as belonging to the plaintiff, were not in the order and disposition of the firm (*Sinclair v. Wilson*, 20 Bear, 324; 1 Jur. (N.S.) 967; 24 L. J. Ch. 537).

**Proceeds of goods shipped destined to special purpose.** The bankrupt shipped goods to M., at New South Wales, and the petitioner accepted bills drawn by the bankrupt for the invoice price, upon the express agreement that the proceeds of the several consignments should be received by the petitioner, and be appropriated by him in discharge of such acceptances, and notice of

## SEC. 16.

this agreement was given to M. Two bills which were remitted to England by M., on account of the proceeds of some of the shipments made by the bankrupt to M., to be applied in discharge of the petitioner's acceptances; the proceeds remitted were clothed with a trust in favor of the acceptor of the bills, there being in fact an equitable assignment of such proceeds. (*Ex parte Flower*, 4 Dea. & C., 449; 2 Mo. & A. 224; see *ex parte Copeland*, 3 Dea. & C., 199; *Ex parte Prescott*, Ib. 218.

Customers drew checks on their bankers, with whom their accounts were already overdrawn, and paid away the cheques, which came to the hands of other bankers. The second bankers remitted to the first the cheques in a printed circular, desiring the amount of them to be paid to the London correspondents of the second bankers. Notwithstanding this circular, the custom between the bankers was to pay one another's cheques, so far as circumstances permitted, by remittances of notes of the bankers sending the cheques directly to those bankers, the understanding being, however, that the cheques should be paid on the day on which they were received, or the day following, either by such remittances, or according to the directions of the circular. The first bankers gave the second credit in their books for the amount of the cheques, but became bankrupt three days after receiving them, and without having made any payment or remittance in respect of them, knowing at the time of receiving the cheques that bankruptcy was inevitable. The assignees obtained payment from the customers of the full amount of the cheques: it was held, that the second bankers were entitled to payment in full of the same amount out of the bankrupt's estate, (*ex parte Cole, in re Wise*, 3 M. D. & D. 189; Lee, p. 75).

Even before the passing of this Statute it was held that, upon an executor or administrator becoming bankrupt, the property in his possession belonging to the testator or intestate, which could be distinguished from his own property was not distributable, (*Ludlow v. Browning*, 11 Mod. 138; *ex parte Ellis*, 1 Atk. 101; *ex parte Marsh*, Ib. 159; *Viner v. Cadell*, 3 Esp. 88; nor could money which could be specifically distinguished as belonging to the deceased be seized under the bankruptcy, (*Howard v. Jemmett*, 3 Burr. 1369, cited by Lord Kenyon, in *Parr v. Newman* 4 T. R. 648; see 1 Winns. Ex., 533-536, 4th ed.). Where assignees possessed themselves of effects which belonged to the bankrupt as executor only, the Court of Chancery, upon the application of the testator's creditors, would appoint a receiver, to whom the assignees should account, (*ex parte Ellis, in re Winsonne*, 1 Atk. 101). A testator may by his will give a qualified executor em-powered by will to trade.

**SEC. 16.** power to his executor to trade with a specific portion of the assets, so that, in the event of the executor becoming bankrupt, the rest of the assets will not be affected by the bankruptcy, although the whole of the executor's private property will be liable, (*ex parte Garland*, 10 Ves. 110; *Cutbush v. Cutbush*, 1 Bear. 184; *Thompson v. Andrews*, 1 M. & R. 116. An executor carrying on his testator's trade pledges to the creditors of that trade his own responsibility. In addition to his personal liability, the trust funds committed to him for the purposes of the trade by the testator are also pledged. In cases of this nature the material enquiry therefore is, to what extent has the testator authorized the executor to employ his assets in the trade? If the executor do not go beyond his authority, then the assets employed by him in the trade can never be proved under the commission; they are a part of the capital of the trade to pay its debts; but, on the other hand, if in breach of his trust, he make use of the assets in the trade, to an extent not authorized by the will, the excess so employed may be proved as a debt under the commission. It is the same thing as if the executor had employed the assets of another estate in the trade, (*ex parte Richardson, in re Hodson*, Buck, 209). A testator directed that it should be lawful for his wife to retain in her hands and employ any sum not exceeding £6,000, in carrying on the trade in which he might be engaged at his decease, and he appointed his wife and son executrix and executor. The widow carried on the testator's trade, taking the son into partnership, and the moneys received were placed at the bankers to their joint account: it was held, on their bankruptcy, that the employment of £6,000 of the assets in the trade so carried on was authorized by the will, and gave no right of proof in competition with the joint creditors, and that the circumstance of the son being taken into partnership made no difference, (*ex parte and in re Butterfield*, 1 De G. 319, 570); Lee, p. 77.

**:Right to publish newspaper.** The right to publish a newspaper has been held to pass to the assignees, (*Longman v. Tripp*, 2 B. & P. N. R. 67; *ex parte Foss in re Baldwin*, 2 D. & J. 230).

**Goodwill of business passes to assignee.** It has been held that the goodwill of the bankrupt's trade, so far as it is local, might pass to his assignees, (*ex parte Thomas*, 2 M. D. & D. 294); as where the goodwill of the business was nothing more than an advantage attached to the possession of a house, the lease of which passed to the assignees, (*Chissum v. Dewes*, 5 Russ, 29; *Parr v Pearce*, 3 Madd. 74; But where a bankrupt's trade as a waggoner was sold by his assignees with the goodwill, the Court, in the absence of any covenant on the part of the bankrupt, refused to grant an injunction to restrain the bankrupt, who had obtained his certificate, from carry-

ing on a similar trade on part of the same road, (*Crutwell v. Lye*, 17 SEC. 16. Ves. 335; 1 Rose, 123). The name or style of a firm constitutes part of its assets, and is a proper subject for valuation, (*Banks v. Gibson*, 6 N. R. 373).

An option to take a lease was held to be an interest in land, within Option to take Act 1840, s. 142; *Buckland v. Papillon*, L. R. 2, ch. 71; Lee, p. 80.

An interest in property given to an uncertificated bankrupt, contingently on his obtaining his certificate, was held to pass to his assignees in bankruptcy, on the certificate being granted, (*Davidson v. Chalmers*, 23 Dea. 653); Lee, p. 80.

It is most important that an attachment should supersede any other Attachment writs in the hands of the sheriff. An equal distribution of the estate supersedes all of an insolvent is the aim of these laws, and this object had very little chance of being accomplished so long as it was in the power of a bankrupt to give disgraceful preferences by allowing a favored creditor to get a judgment by default, and secure priority of execution.

Even before this special enactment, as an amendment to the act of 1864, it was more than doubtful whether an assignment or writ of attachment did not cover property of the insolvent under actual seizure by execution. Indeed it has been so held by a County Court Judge, in a case where a writ of attachment under the Absconding Debtors' Act was received by a sheriff, and acted upon by his attaching defendant's goods. Writs of *fi. fa.* were also placed in his hands against defendant, and he subsequently received an attachment in insolvency. In this case it was held that the ordinary writ of attachment, as well as the *fi. fa.* could not have the effect of keeping the insolvent's property out of the hands of the assignee, (*Henry v. Douglas*, 1 L. J. U. C. (N.S.) 108).

Where a memorial of judgment had been obtained and duly registered before insolvency by a creditor of the insolvent, but no execution registered had issued thereon, it was decided, in a special case stated on the equity side of the Supreme Court, that the plaintiff, the judgment-creditor, could enforce his lien upon the real estate of the insolvent, and that an order should be made directing the assignee, the defendant, to pay to the plaintiff the amount due on the judgment. This decision was sustained on appeal to the full Bench, (*DeVeber v. Austin*, assignee of Glacier, decided in New Brunswick. Report not yet published.)

And where plaintiff, a judgment creditor of defendant, proved his claim before the assignee under the Insolvent Act; afterwards, and before defendant obtained his discharge, the plaintiff issued execution upon his judgment, and levied upon property which the insolvent had

Execution upto  
mentioned in  
schedule.

**SEC. 16.** not included in his schedule of assets :—Held, that whether the property belonged to the defendant at the time of his insolvency or was the property of a third person, he had no right to apply to set aside the execution, as in either case he could have no right to it, (*Jones v. Desbrisay*, Trin. T., New Brunswick, 1871.)

**Quere.**—As to whether the Homestead Act of New Brunswick, which exempts real estate to the value of six hundred dollars from seizure, is not ultra vires quoad traders, and good as to non traders, notwithstanding the provision of this section, (*in re Harris, on in re Porter*, 2 Pugs. Rep. 11.)

**Sale of lands in New Brunswick.** By analogy, and by applying the principles and spirit of the Insolvency Act to proceedings in equity to enforce a sale of lands, the effect of a decree for sale is equivalent to the seizure by the sheriff of land under an execution. And, until actual sale under the decree, the lands embraced in it are vested in the assignee by the effect of his appointment, for the general benefit of creditors, (*Yale v. Tollerton*, 2 Chy. Chr. Reps. 49).

**Conflicting writs of attachment and fieri facias.** A curious point arose in connection with the interpretation of this section in *Converse v. Michie*, 16 C. P. U. C. 167. In the afternoon of 18th September, 1865, the Royal assent was given to the amending Act. In the morning of that day a judgment had been recovered by M. against R.; execution had been placed in the hands of the sheriff at half-past ten, and a seizure had been made of the defendant's goods at about eleven. On the same day a writ of attachment was issued by C. against R. under the Act of 1864, and placed in the hands of the same sheriff at about half-past eleven. It was held that under these circumstances the *f. fa.* goods could not be considered as having been issued and delivered to the sheriff *before* the Act came into force, and therefore by virtue of the Act the writ of attachment prevailed over the execution, and the creditor was not entitled to any pjen for his costs. Edgar 1869.

**Powers of attorney are revoked by bankruptcy.** With respect to *powers of attorney*, it has been determined that a power of attorney given by a bankrupt to receive money for him is revoked by his bankruptcy; (*Hovill v. Lethwaite*, 5 Esp. 158;) and it would seem also that a power of attorney given to a bankrupt for the same purpose would be equally revoked; (*Heedson v. Granger*, 5 B. et al. 31.) But when the power has been given by a bankrupt to do

**Exception.** a mere formal act, such as to sign an endorsement upon the register of a ship when she returns home, (which the bankrupt, indeed, might be compelled to do himself, notwithstanding his bankruptcy,) in such a case the power of attorney has been held not to be revoked; (*Dixon v. Ewart, Buck*, 94; and see *ex parte* and *in re Macdonald, Buck*, 399;

*ex parte Stuart*, 1 Gl. v. J. 344; 1 Dea. B. L 399, 2nd edit.) A letter of attorney which is part of a security for money is not revocable; (*C Walsh v. Whitcomb*, 2 Esp. 565; *Gaussin v. Martin*, 10 B. & C., 731; *Abbott v. Stratton*, 3 J. & Lat. 613.) See Shelford on Insolvency 53, and cases there cited; *Parry v. Jones*, 1 C. B. N. S. 339; 1 & 2 Vic. c. 110 s. 55: 22 & 23 V. c. 35, s. 26. Lee p. 82.

## SEC. 16.

Property belonging to the wife for her separate use is, of course, not divisible among an insolvents' creditors on his bankruptcy. And it has long been settled that if land or personality be devised or settled to or upon a married woman for her separate use, without the precaution of vesting it in trustees; still, in equity, the intention will be effectuated, and the wife's interest protected by the conversion of her husband into a trustee for her. (*Bennett v. Davis*, 2 P. Wms. 316; *Parker v. Brook*, 9 Ves. 583; *Rich v. Cockell*, 9 Ves. 375; *Williams v. Waters*, 14 Mo. W. 166; *Rowe v. Rowe*, 2 De G. & S. 294; *Darkin v. Darkin*, 17 Bea. 578; *Gardner v. Gardner*, 1 Giff. 126.)

Personal chattels bequeathed to a single woman for her separate use, but without the intervention of any trustee, cannot be seized in execution by the judgment creditor of an after-taken husband; (*Newlands v. Paynter*, 4 My. & Cr., 408.)

Where a bankrupt would, from the circumstances of the case, be considered as a trustee for his wife, his assignees were held to be trustees in like manner. In reading over a settlement of the real estate of an intended wife, it was observed that by mistake a moiety was limited to the intended husband for life, instead of to her separate use, and she refused to accept unless the mistake was rectified. The husband then gave a note in writing to the trustees of the settlement that the wife should receive and take the moiety for her separate use, as if it had been so settled. The husband having become a bankrupt, upon a bill against the assignees, it was held, that the wife was entitled to have the moiety assured to her separate use, because the husband was only a trustee for his wife, and the assignees were trustees in the same manner as the husband was; (*Tyrrell v. Hope*, 2 Atk. 558.) A married woman, petitioning by her next friend, was permitted to prove the value of a legacy of stock bequeathed to her separate use, but transferred into the name of her husband who sold it out, and became bankrupt; and a trustee was appointed to receive the dividends on the proof; (*ex parte Wells in re Whitmore*, 2 M. D. and D. 504.) The various expressions which have been held to create a separate use and the converse will be found collected in Lewin on Trusts, ch. 24, sec. 6; but, as remarked there, the intention of excluding the husband must not be left to inference, but must be clearly

**SEC. 16.** and unequivocally declared; for, as the husband is bound to maintain his wife, and bear the burden of her incumbrances, he has a *privity* right to her property; but provided the meaning be certain, the Court will execute the intention, though the settler may not have expressed himself in technical language; (see *Troutbeck v. Brughey*, N.R. 2 Eq. 534.) A legacy to a feme covert directing her receipt to be a "sufficient discharge to the executors," is equivalent to saying to *her sole and separate use*; (*Lee v. Preaux*, 3 Br. C. C. 381.) So a bequest to a feme covert "whenever she shall demand or require the same;" (*Dixon v. Olmius*, 2 Cox, 414;) or "in trust to pay the annual produce into her own hands;" (*Hartley v. Hurle*, 5 Ves. 545, or "to her own use during her life, independent of her husband;" (*Wagstaff v. Smith*, 9 Ves. 520;) or "to be vested in trustees, the income to be for her sole use and benefit;" (*Adamson v. Armitage*, G. Coop. 283;) or a limitation in a settlement "for her own sole use, benefit, and disposition," have all been held to give a separate estate to the wife, which did not pass to the assignees. The husband's right to be tenant by the courtesy of real property devised to his wife may be excluded by an express advise to her separate use and disposal, or by an express declaration for the purpose; (*Hearl v. Greenbank*, 3 Atk. 695; *Burnett v. Davis* 2 P. Wms. 316; *Follett v. Tyver*, 14 Sim. 125.) The nomination of the husband as a joint trustee with others of a trust fund, upon trust to pay the interest to the wife for life, was held insufficient to create a trust for her separate use; (*ex parte Brilby*, 1 Gl. & J. 167.) The intention to give a separate estate must be clearly expressed. A gift to a wife for her own use and benefit does not clearly express such an intention, nor does a gift to a husband for his wife's own use and benefit, the husband being one of the trustees of a settlement, clearly indicate such an intention, more especially where the preceding part of the settlement had declared a trust for the separate use of another in the proper form of words:

(*Kensington v. Dolland*, 2 My. & K. 184.) A trust for the wife's own use and benefit is not a trust for her separate use; (*Beales v. Spencer*, 2 Y. & C. C. 651, *Carnet v. Ward*, 7 Bing. 608.)

A testator devised and bequeathed two freehold houses to his daughter, her heirs and assigns, with all the furniture in one of the houses, "for her own sole use and benefit;" it was held, that these words applied to the furniture as well as to the house, and that the daughter, having after the testator's death intermarried with K., who afterwards became a bankrupt, was entitled as against the assignees, to the whole of the furniture for her separate use; (*ex parte Killick*, 3 M.D. & D. 480. See *Adamson & Armitage*, 19 Ves. 416; *ex parte Ray*, I

Mad. 199; *Newlands v. Paynter*, 4 My. & C., 408; *Lady Arundel v. SEC.* 16. *Phipps*, 10 Ves. 139; *Tullett v. Armstrong*, 4 My. & C., 377.) The *corpus* of real estate may be settled to the separate use of a married wife's property woman; (*Taylor v. Meads*, 34 L. J. Ch. 203; 5 N. R. 348.)

Apart from special circumstances it appears that personal chattels given to a married woman do not belong to her for her separate use; (*Ridout v. Lord Plymouth*, 2 Atk. 104;) but where Lord L. returned from France, and delivered a picture of the Regent of France, set about with four diamonds, to Lady L., and said at the same time it was a present sent her by the Regent, it was held, that being a present from a stranger during the coverture, it must be construed as a gift to her separate use; (*Graham v. Londonderry*, 3 Atk. 393;) and cases there maintained. The evidence that is necessary to prove that a gift by the husband to his wife, was in fact for her separate use, is very fully considered in *Grant v. Grant*, 34 Bea. 633; 13 W. R. 1057.

The paraphernalia of the bankrupt's wife is quite distinct from the *Paraphernalia of wife*. property settled to her separate use. The husband has full power to dispose of the articles which came under this head, at any time during his lifetime; and if he becomes bankrupt, they form part of the property devisable among his creditors; (*Ridout v. Lord Plymouth*, 2 Atk. 104; 1 Wms. Exers. 721. 6th. edit.) Paraphernalia is used to designate the apparel and ornaments of the wife suitable to her rank and degree. 2 Rop., *Husband & Wife*, 141, 2nd. edit.; and where a husband expressly gives things to his wife after marriage (*see supra*, as to before marriage) to be worn as ornaments of her person only, they must be considered as paraphernalia; (*Graham v. Londonderry*, 3 Atk. 293.) Lee. 91.

A policy contained a condition that the policy should be void if the *Interest insurance.* life insured died by suicide, but if any third party had acquired a bona fide interest therein by assignment or by legal or equitable lien for a valuable consideration, or as security for money, the policy should, to the extent of such interest, be valid. On the 9th July, the life insured, who was a merchant at Valparaiso, became bankrupt according to the law there, and all his estate and effects became vested by operation of law in the *escribard* or notary officially attached to the court. On the 14th July he committed suicide. On the 15th July a meeting of creditors was held and assignees appointed. In an action by them on the policy, it was held, that the assignment by operation of law was not within the proviso in the policy, as no interest had been acquired by contract, and therefore the assignees were not entitled to recover; (*Jackson v. Foster*, 5 Jur. N. S. 557; 28 L. J. Q. B. 166; affirmed 5 Jur. (N. S.) 1247; 29 L. J. Q. B. 8.)—Lee. p. 98.

**SEC. 16.** The assignment will not vest in the Assignee property beyond the reach of the Insolvent law. For instance,—an insolvent absconded from Ontario to the United States. He was there followed by the agent of the person in that Province, who had become his surety, and by threats of criminal proceedings induced to pay the amount of security. A bill by the official assignee to recover the money from the surety, was dismissed, on the ground that the money handed to the defendant was not within reach of our laws, it would not have formed part of the Insolvent's estate for distribution. (*Roe v. Smith*, 15 Chy. Rep. 344.)

**Foreign real estate.** It was held that real estate situate in a foreign country, that is out of the dominions of Her Majesty, did not pass to the assignees; (*Cockerell v. Dickens*, 1 M. D. & D. 45.) And a bankrupt could not be compelled directly to assign his foreign real estate to his assignees;

(*Selkrig v. Davies*, 2 Dow. 245 ; 2 Rose, 291.)

**Foreign personal property.** According to the law of England, and of almost every other country, personal property has no locality, but is subject to the law which governs the person of the owner. It followed that, unless there was a positive law there to prevent it, the bankrupt's personal property in foreign countries passed to his assignees. (See. 1 H. Bl. 690 ; Cullen, 240 : *Hunter v. Potts*, 4 T. R. 182 ; *Sill v. Worswick*, 1 H. Bl. 665 ; *Phillips v. Hunter*, 2 H. Bl. 402 ; *Selkrig v. Davies*, 2 Dow. 230 ; 2 Rose, 291 ; *Cockerell v. Dickens*, 1 M. D. & D. 45 ; Wheaton's International Law, p. 198, 6th edit.)—Lee, p. 110.

**Where firm only assigns.** Where after a deed of assignment for benefit of creditors by two partners one becomes bankrupt, the trustees under the deed are entitled only to the joint estate of the debtors, and not to the separate estate of either debtor. (*In re Lowden's Settlement*, 10 L. T. (N.S.) 261).

**Bequest to insolvent.** A bequest to a bankrupt, if he should obtain his certificate, passes to his assignees, (*Davidson v. Chalmers* ; *Perry v. Chalmers*, 10 L. T. (N.S.) 217).

**Rights of action pass to assignee.** The debts due to the bankrupt and the damages to be recovered by him for the breach of contract relative to the bankrupt's personal estate, as such, affect its value and passed as personal estate to the assignees ; (*Hill v. Smith*, 12 M. & W., 630.)

**Exception actions for personal wrongs, &c., remain with insolvent.** The right of action for an injury to the body or feelings of a bankrupt, arising from a tort independent of contract, did not pass to the assignees, *ex. gr.* for an assault and battery or slander, or for the seduction of a child or servant; (*Howard v. Crowther*, 8 M. & W. 601.) At the same time might be said of some personal injuries, arising out of breaches of contract, such as contracts to cure or marry ; (*per Lord*

**Denham ; C. J. Drake v. Beckham**, 11 M. & W. 319.) It seems, however, that a right to a sum of money, whether ascertained or not, expressly agreed to be paid in the event of failing to marry or cure, would pass; (*Beckham v. Drake*, 2 H. L. 645.) Assignees could not maintain an action for libel, although the injury thereby to the bank rupt's reputation might have been the sole cause of his bankruptcy; (*per Alderson, J., Howard v. Crowther*, 8 M. & W. 604.) Lee, p. 94. See sec. 39, *post*.

It is probable that the option to take a lease would pass to the assignee under this clause, and might be sold by him and assigned to the purchaser, unless the lease is to contain a proviso against alienation. (See *Buckland v. Papillon*, 1 L. R. Eq. 477.)

A legatee entitled under a will to such share as testator's widow **Legacy**. should appoint, and in default to one-fifth of a moiety, by a deed under the Bankruptcy Act, 1861, assigned all his "estate and effects" to trustees for creditors. The widow having subsequently appointed to the legatee the same share he would have taken in default of appointment, it was held that the appointed share did not pass to the trustees under the deed of assignment. (*In re Vizard's Trusts*, 1 L. R. Eq. 667, following *Lee v. Olding*, 2 Jur. (N.S.) 850.)

The assignment will not displace a solicitor's lien for costs, or entitle the assignee to possession of the papers. Where a partner of a trading firm, which had become bankrupt, was also one of the firm of solicitors whom the trading firm had employed in the conduct of suits which were pending at the time of bankruptcy, and the assignees in bankruptcy had retained other solicitors, it was held that the assignees in bankruptcy were not entitled to an order for a delivery up to the assignees of the papers in the solicitor's possession, subject to their existing lien, (*in re Moss*, 2 L. R. Eq. 345.)

Where the assignees and creditors of a bankrupt, who has not obtained his discharge, allow him to trade or contract debts without their interference or claim, it falls within the principle of a man having a lien standing by and allowing another to take a new security, whereby he is postponed; and the subsequent creditors of the bankrupt will be preferred to the creditors under the bankruptcy (*Troughton v. Gitley*, Amb. 630; and see *Tucker v. Hernahan*, 17 Jur., 723).

An insolvent having made a voluntary assignment in 1867, compounded with his creditors, had his goods restored to him, and resumed his business with the knowledge of his assignee and creditors, and contracted new debts. It was subsequently discovered that he had been guilty of a fraud which avoided his discharge, whereupon he absconded, and an attachment under the Insolvent Act of 1869,

## SEC. 16.

Option to take a lease passes to assignee.

Solicitor's lien for costs not displaced by assignment.

Assets of insolvent second time bankrupt vests in new assignee.

**SEC. 16.** was sued out by his subsequent creditors:—Held, that they were entitled to a priority over the former creditors. (*Buchanan v. Smith*, 17 Chy. 208. Rob. & J. Dig., 413.)

Assignee acquires no priority by prior registration.

An assignee in insolvency cannot acquire priority over a prior vendee of the insolvent by prior registration of the instrument appointing such assignee. (*Collyer v. Shaw*, 19 Chy. 599 Rob. & J. Dig. 417), provided that the venous deed were registered within the delay. See arts 2090 *et seq.* of the Civil Code.

Money fraudulently paid though innocently received.

A payment made by an insolvent, after the issue of a writ of attachment against him, on account of a draft discounted by bankers for him, and which was dishonoured by non-acceptance, is recoverable back by the official assignee, though the bankers were ignorant of the insolvency when they received the money from him (*Roe v. Royal Canadian Bank*, 19 C. P. U. C. 347).

Wheat given to miller to grind does not vest in assignee.

The insolvent, a miller, agreed to grind wheat for the claimants, and to deliver to them a barrel of flour of a specified quality for so many bushels of wheat, and he thus became liable to deliver to them 955 barrels of flour, as equivalent for wheat received by him and made away with:—Held that this was a bailment only of the wheat, which remained the claimants', to the insolvent: that such bailment was determined by the conversion of the wheat, so that the claimants might maintain trover for it either as wheat, or as flour if ground: that they might waive the tort and sue for the value of the goods when they should have been delivered; and that the claim therefore was proveable as being a debt within the Insolvent Act, not a claim for unliquidated damages:—Held, also, that a claim for compensation as to a certain number of barrels, not of the quality agreed for, was, clearly a claim for unliquidated damages, and could not be proved. (*In re Williams*, 312 B. 143, Rob. & J. Dig. 424.)

Private assets of partners.

The private estates of the partners of a firm which has assigned or been placed in compulsory liquidation rest in the assignee, (*in re Macfarlane & Court & Stewart*, Montreal, Popham Ins. Act of 1869, p. 32.)

Undelivered goods.

The enactment that all property belonging to or vested in the bankrupt becomes divisible among his creditors, is qualified, as regards goods which have been consigned to the bankrupt, but not paid for or delivered, by the vendor's right of stoppage *in transitu*.

Stoppage *in transitu*.

This right of stoppage *in transitu* has been long recognized, both by English law and general mercantile law; thus Lord Mansfield says, in *Stokes v. La Rivière* 3 T. R. 466: “No point is more clear than if goods are sold, and the price not paid, the seller may stop them *in transitu*; I mean in every sort of passage to the hands of the buyer;” and these words are quoted with approval in *Bohilingk*

v. *Inglis*, 3 East, 398; and I see *The Constantia*, 6 Rob. Adm. 325. SEC. 16. But although the doctrine had been frequently discussed, it was stated, as recently as 1841, in *Gibson v. Carruthers*, 8 M. & W. 337, by Lord Abinger, that the principles on which it depended had at that time never been satisfactorily settled. Several modern cases which have since tended to elucidate these principles, will be found cited below; the older cases are more fully discussed in Eden's B. L., 3rd edit., p. 313, Tudor's Merc. Ca., notes to *Whitehead v. Anderson*, and Benjamin on Personal Property, 625.

In *McEwan v. Smith*, 2 H. of L. Lord Campbell, C. J., said: "A stopping *in transitu* is this: where a vendor of goods has to send them to a vendee, and has for that purpose parted with them to a carrier, he may, upon hearing of the insolvency of the vendee, while they remain in the hands of the carrier, and before delivery to the purchaser, stop their delivery." See also *per* Lord Romilly, M. R., on *Fraser v. Witt*, L. R. 7 Eq. 69.—Lee, p. 111.

This right, however, to countermand the actual delivery of goods to a consignee, is limited to the cases in which the bankruptcy or insolvency of the consignee takes place. (*Wilmhurst v. Booker*, 2 Mann. & G. 812, *per* Tindal, C. J.; *Fraser v. Witt*, L. R. 7 Eq. 70.)—Lee, p. 112.

Part payment by the consignee does not divest the right to stop, it *not a bar*. Part payment has only the effect of reducing the equitable lien *pro tanto*. (*Hodson v. Loy*, 7 T. R. 440.)

Whether the effect of a stopping *in transitu* be to rescind the contract, or merely to revest a lien, is a question which has been frequently discussed, but does not seem to be quite settled; *per* Parke, B. 2 M. & W. 379. (See *Clay v. Harrison*, 10 B. & C. 99; *Bloxam v. Saunders*, 4 B. & C., 491; *Sur. Merc. L.* 550, 7th edit., 1 *Sur. W. C.* 748, 6th edit.; *Heincky v. Earle*, 8 E. & B. 410.) But of late the Courts have shown a disposition to hold that stopping *in transitu* does not rescind the contract, but only gives or restores to the vendor a lien for the price; (*per* Cairns, L. J., *Schotsman v. Lancashire & Yorkshire Rail Co.*, L. R. 2 Ch. 340.)

In the Prov. of Quebec the rights of the unpaid vendor are regulated by arts. 176 and 177 of the custom of Paris, and arts. 1998, 1999 and 2000 of the civil code of that province. The application of the rules laid down in these articles has been frequently found accompanied with difficulty: (*Sylvestre v. Saunders*, 15 L. C. Jurist p. 303; *Noad v. Lampson*, 11 L. C. Rep. p. 29; *Tetu v. Fairchild et al.*, 6 L. C. Rep. p. 269; *in re White & Kerr & Labatt, petnr.*, Montreal, 1874.) These rights however are by the present Act limited to that of stopping in transition. See sec. 182 post.

SEC. 16.

Stoppage *in transitu*.

**SEC. 16.****Stoppage in transitu.**

Besides the rights provided for in these articles the law of that province also recognizes the right of stoppage *in transitu*, and the doctrine is laid down in the following cases:

"In case of the revendication allowed under Articles 1998 and 1999 of the Code the proceedings must be taken within fifteen days of the sale, and within eight days of the delivery of the goods revendicated; (*Sylvestre and Sanders et al.*, 15 L. C. Jurist p. 303.)

In *Hawkesworth v. Elliott et al., and Brown, assignee*, a majority of the Judges in appeal (three against two) sitting at Montreal, reversed the judgment of the court of original jurisdiction and held that the delivery of goods purchased in Great Britain, by the insolvents, merchants in Montreal, to the agent of the latter in Liverpool, deprived the vendor of this privilege.

The facts of the case were, on 9th Feb. 1866, the plaintiff, at Sheffield, England, sold defendant a cask of cutlery. The goods were delivered to the vendee's shipping agent at Liverpool, and forwarded by him to the defendant at Montreal. On their arrival they were bonded by the purchaser's custom house broker, and more than fifteen days after, they were seized by the plaintiff as the unpaid vendors, under the 12 sec. of Insolvent Act of 1864, as the former had become insolvent. The assignee of insolvents pleaded that the delivery to their agent at Liverpool was a delivery to themselves, and as fifteen days had elapsed from delivery to the seizure, the plaintiff's right to regain possession had ceased and this pretension was maintained, Popham *Ins Act of 1869* p. 29.

In Whyte ass. to *Fraser v. Davis, and Moritz*, intervening, the latter, a merchant in Antwerp, sold in June, 1868, to Fraser, the Insolvent, of Montreal, 10 cases of glass. The goods were shipped by vendor to the latter. On their arrival at the port of Montreal, Fraser, who had in the meantime become insolvent and assigned, notified Moritz of the change of his condition, and conceiving he had no right therefore to take delivery, instructed defendant Davis to do so, as the agent of Moritz, and indorsed the bill of lading to him for that purpose.

The assignee of Fraser's estate seized the glass, as having been in the legal possession of Insolvent, and therefore the property of the creditors generally.

In Superior Court, Montreal, Mondelet, J., decided that under these circumstances the vendor had not lost his privilege of stopping *in transitu*, because the goods had not come into the actual possession of the vendee or his agents, *Ibid*, p. 31. This decision was subsequently confirmed in review in 1871 and in appeal in 1872.

The law in each province exempts certain property from seizure, SEC. 16. and these exemptions, as well as trust property, are excepted from the property which, under this Act, becomes vested in the assignee. They are as follows:—

IN ONTARIO (by 23 Vic. c. 25 amended by 24 Vic. c. 27).

Exceptions in  
favor of insol-  
vent.

1. The bed, bedding, and bedsteads in ordinary use by the debtor and his family;
2. The necessary and ordinary wearing apparel of the debtor and his family;
3. One stove and pipes, and one crane and its appendages, and one pair of andirons, one set cooking utensils, one pair of tongs and shovel, one table, six chairs, six knives, six forks, six plates, six teacups, six saucers, one sugar basin, one milk jug, one teapot, six spoons, all spinning wheels and weaving looms in domestic use, and ten vols. of books, one axe, one saw, one gun, six traps, and such fishing tackle and seines as are in common use;
4. All necessary fuel, meat, fish, flour and vegetables actually provided for family use, not more than sufficient for the ordinary consumption of the debtor and his family for twenty days, and not exceeding in value the sum of forty dollars;
5. One cow, four sheep, two hogs, and food therefor for thirty days;
6. Tools or implements of, or chattels ordinarily used in the debtors occupation to the value of thirty dollars.

IN QUEBEC—Code Civ. Pro. arts. 556 and 558.

1. The bed, bedding, and bedsteads in ordinary use by the debtor and his family;
2. The necessary and ordinary wearing apparel of the debtor and his family;
3. One stove and pipes, and one crane and its appendages, one pair of andirons, one set of cooking utensils, one pair of tongs and shovel, one table, six chairs, six knives, six forks, six plates, six teacups, six saucers, one sugar basin, one milk jug, one teapot, six spoons, all spinning wheels and weaving looms in domestic use, and ten vols. of books, one axe, one saw, one gun, six traps, and such fishing nets and seines as are in common use;
4. Fuel and food, not more than sufficient for thirty days, and not exceeding in value the sum of twenty dollars;
5. One cow, four sheep, two hogs, and food therefor for thirty days;
6. Tools and implements or other chattels ordinarily used in the debtors' occupation to the value of thirty dollars;
7. Bees, to the extent of fifteen hives.

**SEC. 17.** In NEW BRUNSWICK:—

The insolvents' wearing apparel, bedding, kitchen utensils and tools of his trade or calling to the value of fifteen pounds. v. Revised Stat, N. B. c. 124, sec. 15.

Insolvent to furnish statement of his liabilities, assets, &c.

In PRINCE EDWARD ISLAND, wearing apparel and kitchen utensils to the amount of £15; and in NOVA SCOTIA to the value of \$40.00, are thus exempted.

**17.** The Insolvent shall within ~~ten~~ days of the date of the assignment, or from the date of the service of the writ of attachment, or if the same be contested, within ten days from the date of the judgment rejecting the petition to have it quashed, furnish the Assignee with a correct statement (Form F.) of all his liabilities direct or indirect, contingent or otherwise, indicating the nature and amount thereof, together with the names, additions and residences of his creditors and the securities held by them, in so far as may be known to him. The Insolvent shall also furnish within the same delay a statement of all the property and assets vested in the Assignee by the deed of assignment or by the writ or writs of attachment issued against him, and such statement shall in all cases include a full, clear, and specific account of the causes to which he attributes his Insolvency, and the deficiency of his assets to meet his liabilities. The insolvent may at any time correct or supplement the statements so made by him of his liabilities and of his property and assets.

What it must shew.

+ "seven" 40 Vic: Sec 9.

## FORM F.

**INSOLVENT ACT OF 1875. In the matter of A. B., an Insolvent.**  
**SCHEDULE OF CREDITORS.**

**SEC. 17.**

Form of statement by insolvent.

I. Direct Liabilities.				Total.
Name.	Residence.	Nature of Debt.	Amount.	
2. Indirect liabilities, maturing before the day fixed for the first meeting of creditors.				
Name.	Residence.	Nature of Debt.	Amount.	
3. Indirect liabilities, maturing after the day fixed for the first meeting of creditors.				
Name.	Residence.	Nature of Debt.	Amount.	
4. Negotiable paper, the holders of which are unknown.				
Date.	Name of Maker.	Names liable to Insolvent.	When due.	Amount.

**Sec. 18.**

**Statement by  
partnerships.**

"In cases of partnership the bankrupts shall produce a statement of their partnership affairs, and each bankrupt shall produce a statement of his separate affairs." 91st General Rule, made in pursuance of the Imperial Bankruptcy Act 1869.

Wilful and fraudulent omissions from this statement are misdemeanors; v. sec. 140, *post*.

The statute (act of 1864) is substantially complied with if the debt is set out in such a manner as cannot mislead, and leaves no doubt as to the debt referred to, and the amount is capable of being ascertained by the creditor. (*Cameron v. Holland*, 29 G. B. 506. Rob. & J. Dig., 442.)

**Petition by  
insolvent to set  
aside attach-  
ment.**

**Hearing in such  
case.**

**18.** The Insolvent may present a petition to the judge at any time within five days from the service of the writ of attachment; and may thereby pray for the setting aside of the attachment made under such writ, on the ground that the party at whose suit the writ was issued has no claim against him, or that his claim does not amount to two hundred dollars beyond the value of any security which he holds, or is not proveable in insolvency or that his estate has not become subject to liquidation; or if the writ of attachment has issued against a debtor by reason of his neglect to satisfy a writ of execution against him as hereinbefore provided, then on any of the above grounds or on the ground that such neglect was caused by a temporary embarrassment, and that it was not caused by any fraud or fraudulent intent, or by the insufficiency of the assets of such debtor to meet his liabilities; and such petition shall be heard and determined by the judge in a summary manner, and conformably to the evidence adduced before him thereon; and the judgment, subject to appeal as hereinafter provided, shall be final and conclusive.

The exception, provided for by sec. 26 of the act of 1869, of not allowing such a petition in cases where the Insolvent has already petitioned against a demand (under sec. 5 *ante*), is omitted here, and it is difficult to perceive why, as where such a petition has been already presented, the two must, or should be, substantially the same.

**Delay absolute.** This delay of five days is absolute and cannot be extended; see cases cited under s. 5 *ante*. After the expiration of the five days from the

*s"or want of, or for a substantial insuffi-  
- ciency in the affidavit required by section  
- nine." 39 Vic ch 30. s. 3.*

return day of the writ of attachment, the plaintiff cannot settle with the defendant, or withdraw his writ. The estate is then in insolvency, and subject to compulsory liquidation; and the creditors have acquired such an interest in the estate as to entitle them to intervene. (*Worthington v. Taylor* 10 L. J. U. C., 333: under sub-sec. 13 of sec. 3. of the Act of 1864.

One clear day's notice of the petition should be given to the creditors moving.

**19.** A copy of the deed of assignment or a copy of the writ of attachment, as the case may be, certified by the Assignee or the clerk of the court, shall forthwith be registered in the registry office of the county wherein the Insolvent resides, and also in every county or registration district wherein he may have any real estate; in the Province of Quebec such deed of assignment or writ of attachment shall be accompanied by a description of the real estate belonging to the Insolvent, and shall be registered in the county or registration district wherein the same is situate, with a notice that the same has, by such assignment or writ of attachment, been transferred to the Assignee.

It would seem, taking this article in connection with the preceding one, that this registration should only be made after five days.

**20.** Immediately after the assignment shall have been made, or in the case of an attachment, immediately after the delay within which the attachment can be contested or immediately after the contestation has been rejected, or, with the consent of the Insolvent, immediately after the writ shall have been returned, the Official Assignee shall forthwith call a meeting of the creditors of the Insolvent to be held at the place and on the day and hour to be mentioned, notice of which meeting, in the Form G, shall be published at least twice in the <sup>first meeting of</sup> Official Gazette, the first publication of which notice shall be at least ~~three weeks~~ before the day fixed for such meeting.

- 1. "On Quebec by the proper Notary or by"
- 2. "Copy of the - 40 Vic: sec 4."
- 3. "within 21 days"
- 4. "once"
- 5. "once in one local or the nearest published newspaper"
- 6. "days"
- 7. "noted always that the assignee omits to be held within the time"

above limited, the judge shall, on the application of the assignee, or of any creditor, order the meeting to be called for the earliest possible day there after; and should the said omission have arisen from the negligence of the assignee, the judge shall order him to pay to,

FORM G.

INSOLVENT ACT OF 1875.

Form of notice In the matter of an Insolvent.

The Insolvent has made an assignment of his estate to me, (or, a writ of attachment has been issued in this cause) and the Creditors are notified to meet at in on the day of at o'clock to receive statements of his affairs, and to appoint an Assignee if they see fit.

(Date and residence of Assignee.)

(Signature.)

(The following is to be added to the notices sent by post.)

The Creditors holding direct claims and indirect claims for one hundred dollars each and upwards, are as follows: (names of Creditors and amount due) and the aggregate of claims under one hundred dollars is \$

(Date.)

(Signature.)

Notice to each creditor. Besides the advertisement in the Official Gazette notices must be sent to each creditor at least ten days before the meeting (see. secs. 21 & 101 post.)

Local advertisements. The necessity of advertizing in the local papers is by this clause done away with, except in the special case provided by the following section, and advantageously, for the expense of these advertisements has been found a no insignificant burthen on estates, without affording any corresponding advantage. The papers published at the commercial centres generally contain a summary of insolvent news, and this with the personal notices and advertisement in the Official Gazette furnish ample information to the creditor of ordinary prudence.

A. "Prepaid &  
registered"  
40 Vic sec 4.  
of such meetings  
of the insolvencies  
amounts of those  
settling claims -

Notice to each creditor by mail. 21. The Assignee shall also forward by mail, at least ten days before the meeting takes place, a notice in writing to every creditor mentioned in the original or any corrected or supplementary list or statement furnished by the Insolvent, or who may be known to him to be a cre-

22. The costs of the application; provided also that on application of any creditor, the judge on being satisfied that there are creditors of the insolvent whose unsecured claims amount to at least  $\frac{1}{4}$  of his direct liabilities, resident in any place from whence the attested claims cannot with due diligence be received before the day of the meeting, or as on the

that the meeting be adjourned to some day not more than a week thereafter a copy of the order shall forthwith be served on the Assignee who shall forthwith by means of letter or circular notice place each creditor of the assignee in case such order be made on business shall be transacted at the meeting which shall stand adjourned

ditor, and give such other notice as the circumstances of SEC. 21.

the case may require. But in case the Assignee is unable to obtain such list, then ten days notice shall be given by Proviso.  
advertisement in one local or the nearest published news paper.

See form G. in connection with previous section.

In the province of Quebec it would seem to be left to the discretion of the Assignee to insert in papers published in each language, or in only one.

**22.** The creditors at their first meeting held at the time and place fixed for that purpose, may appoint one of themselves as chairman of the meeting; and at all subsequent meetings the Assignee shall be chairman, *in default of an* <sup>Who shall preside at meetings.</sup> *or*

**23.** The Insolvent shall be bound to attend at the first meeting of his creditors, and after making such corrections as he may deem proper to his statements of liabilities and assets, shall attest the same under oath. He may also be examined under oath before the Assignee, by or on behalf of any creditor touching his affairs; and more especially as to the causes of his insolvency, and the deficiency of his assets to meet his liabilities.

For the punishment of the insolvent for concealment or false statements at this examination see s. 140, post.

**24.** The Insolvent shall sign his examination or declare the reasons why he refuses to sign, and the examination shall be attested by the Assignee. <sup>Attestation &c. of Examination.</sup>

**25.** The insolvent shall, at all times until he shall have obtained a confirmation of his discharge, be subject to the order of the court or judge, and to such other examination as the judge, the Assignee, the Inspectors hereinafter mentioned, or the creditors may require; and he shall at the expense of the estate, execute all proper writings and instruments and perform all acts required by the court or judge touching his estate; and in case the Insolvent refuses to be sworn or to answer such questions as may be put to him, or to sign his answers or the writings or instruments, or refuses to perform any of the acts lawfully required of him, such Insolvent may be committed and punished by the court or judge as for a contempt of court.

*+ according to the terms of the order". 39 Vic: ch. 30  
sec 4. 40 Vic sec 5-  
by appointment of chairman by the creditors.  
40 Vic: sec 7.*

**SEC. 25.** An order for the examination of witnesses made on the day of a voluntary assignment under the act, of a partnership estate by two Order for ex-amination on only, out of three partners, is irregular, and a petition for examination day of assign-should, moreover, state satisfactory reasons for the order (*Lusk et al., and Foote*, 17 L. C. Jurist, p. ).

**Insolvent may consult counsel.** The debtor may have counsel to consult upon his examination in regard to questions he must answer, *viva voce*, and to prepare answers to those put to him in writing. (*Ex parte Windsor*, 8 Law Rep. 514.) But it is within the discretion of the Court to allow counsel in the *viva voce* examination. (*Peabody v. Harmon*, 3 Gray, 113).

The bankrupt has the undoubted right to have the assistance of counsel. The only question is whether he has the right to consult counsel during the course of his examination. Generally no consultation is allowed, but no rule can be laid down to govern the exceptions. The solution of the question is left to the register to decide, in the exercise of a sound discretion, according to the facts of each particular case. (*In re Lord*, 3 B. R. 243; *in re Judson*, 1 B. R. 82; s.c. 2 Bt. 210; s.c. 35 Hov. Pr. 15.)

**Insolvent can- not be cross-ex- amined.** In Montreal (*Monk J.*) held that an Insolvent could not be cross-examined by his counsel in his examination by the creditors in Court.

(*Fraser & Sauvageau, Assignee, & Winning* 12 L. C. Jur. 272.) Pop. 144.

The bankrupt may be examined in regard to all matters relating to the disposal or condition of his property; to his trade and dealings with others, and his accounts concerning the same; to all debts due or claimed from him, and to all other matters concerning his property and estate, and the due settlement thereof according to law (s. 5086.)

Examinations taken in another action may be admissible against him to show the state of his property. (Avery & Hobbs, Bank, U. S. 186.)

**Must answer all questions.** He must answer the question put to him, although the answer may subject him to penalties, as for smuggling, &c. (*Ex parte Meymot*, 1 Atk. 200) : or may tend to establish an act of bankruptcy. (*Pratt's case*, 1 Glyn & J. 58.) He is not obliged to answer any that has a tendency to accuse him of a criminal act. (*In re Heath*, Mon. & B. 185; 2 Dea. & C. 214.) But he cannot, though, after he has passed his last ordinary examination, refuse to answer on the ground that the tendency of the question is to show that he has not made a full disclosure, and by consequence has been guilty of perjury. (*In re Smith*, 2 Dea. & C. 230; Mon. & B. 203.)

The bankrupt asks that in consideration of his complying with every requirement of the law, he may be absolved from every legal

## SEC. 25.

obligation to his creditors. This is an extraordinary exemption, and when he asks for it the law only allows it when he surrenders himself to be dealt with in an extraordinary way, if the court sees proper to exercise that power to the ends of justice. Information possessed by the bankrupt is often important to the proper adjustment of conflicting interests, to the establishment of an unjust claim against his estate; to establish justice in disputes that may arise between assignees and debtors to the estate or between the assignees and such persons as may claim to have liens or priorities. For all such and for all other purposes the bankrupt is subject to the order of the court, to be examined and summoned at any and at all times when it may seem that the ends of justice will be furthered thereby. (*In re Brandt*, 2 B. R. 215; *in re Vogel*, 5 B. R. 393.)

The examination does not extend to his moral conduct, unless it is shewn that the answers would disclose something relating to the disposition of his property. Anon. 1 Fon. B. c. 58. The examination should be full, fair, and searching, not rambling or irregular. *Ex parte Legge*, 17 Jur. 415.

As to fully answering questions, there is no definite rule, the question being whether the answers are sufficient to satisfy the mind of any reasonable man. (*Ex parte Nowlan*, 6 T. R. 118.)

The insolvent who appears, by virtue of an order under this section, is not entitled to claim his expenses before being sworn, although a witness might, and he may be examined before as well as at or after the meeting to appoint an assignee, (*Worthington vs. Taylor*, 10 L. J., 304, C. C., Logie, Rob & Joseph Dig. 451.)

A party need not answer any question which does not relate to any matter of fact in issue, or to any matter contained in his direct testimony, when a truthful answer would tend to degrade him. (*In re H. Lewis*, 3. B. R. 621; s.c., 4 Bt. 67.) But he cannot refuse to answer questions concerning his dealings with the bankrupt on the ground that his answer may furnish evidence against him in a civil case brought or to be brought on behalf of the assignee; for the main, if not the only, purpose of the statute in authorizing such examination is to enable the assignee to obtain evidence for civil suits, or to ascertain that there is no such evidence. (*In re Fay et al.*, 3 B. R. 660; *in re Pioneer Paper Co.*, 7 B. R. 250; *Garrison v. Markley*, 7 B. R. 246.)

The bankrupt must state whether he has played cards, faro, or any other game of chance, with certain persons prior to the commencement of proceedings in bankruptcy, though the answer may tend to degrade him. (*In re Richards*, 4 B. R. 93; s. c. 4 Bt. 303.) The question whether the bankrupt may be compelled to answer a

Questions can-  
not be on moral  
conduct.

What questions  
must be answered.

What questions  
bankrupt must  
answer.

**SEC. 25.** question when his answer would criminate himself may be considered as still unsettled. In two brief cases, it has been decided, without argument and without an examination of the authorities, that he could not. (*In re Patterson*, 1 B. R. 152; s. c. 1 Bt. 508; *in re Koch*, Examination of 1 B. R. 549.) It has also, on the other hand, been decided that he insolvent. cannot cover up his fraud behind the shield that if he answers he will criminate himself by proving up his fraud in testifying as to the distribution of his property. Though such examination may expose him to penalties for fraudulent concealment or fraudulent disposition of his property, he is left to the judgment of the law. It is possible or rather probable, that he may be protected from disclosing some distinct criminal act; but even in such case he cannot be protected in refusing to discover all his estate and effects and the full particulars relating to them, though thereby he may show that he has been guilty of fraud or fraudulent concealment, or that he owns property that has been illegally obtained, and will thus render himself liable to penalties. (*In re Brondey & Co.*, 3 B. R. 686.) It has, however, been held that the examination is not competent evidence against him in a criminal action, (*U. S. v. Prescott*, 2 Dillon, 405; *in re Brooks* 5 Pac. L. R. 191,) and in that view of the law there appears to be no good reason why he should be compelled to answer fully. Bumps, page 180.

**May be examined after deposit of deed of composition.** Held in Montreal, that the Insolvent may be examined by a creditor, before the Judge, notwithstanding that a deed of composition and discharge had been deposited in Court, and that notice had been given by the Insolvent of his intention to seek its confirmation.

This decision arose on the application of the creditor, by petition, to examine the Insolvent, as to his estate. The application had been granted, without notice to the Insolvent. On the day fixed for his examination, he appeared by counsel, and refused to be sworn, on the ground that he was no longer insolvent, in consequence of the due execution of a deed of composition and discharge, the sufficiency of which he was then prepared to prove. (*Bowie & Rooney*, 13 L. C. Jur. 191). Pop. 146.

**Committal of bankrupt for improper replies.** If a bankrupt swears to a disposition of property that appears incredible, or where the story is not such as to satisfy the minds of reasonable persons as to the truth, it is unsatisfactory, and he may be committed. (*Ex parte Lord*, 16 M. & W. 462; *Ex parte Nowlan*, 6 T. R. 118.) Where a bankrupt, on examination, being asked to account for a deficiency of £13,000, answered he had lost £2,000 on goods sold, and £1,000 by mournings, and for the last nine or ten years he had been extravagant and squandered large sums of money, this was held unsatisfactory, and that it was right to commit him upon it.

(*Rex v. Perrot*, 2 Burr, 1122.) Afterwards he answered he had given £5,000 to a woman, since dead, in one year that he drew the money from a man who sold goods for him, since dead. This was held unsatisfactory. *Ibid*, 1215. When asked if he purchased certain silks

## SEC. 25.

Examination of insolvent.

of a party, and he answered, he could not possibly recollect, and being pressed, said he rather believed he had, this was held to be satisfactory. (*Miller's case*, 3 Wils. 427.) Whether for the purpose of determining that the answers of a bankrupt are unsatisfactory, the Court can resort to the evidence of third parties. (*Quare, Crowley's case*, 2 Swanst. 1.) Pop. 145.

The committal of the bankrupt for refusal to appear or answer before the assignee might be obtained on petition to the judge. (See secs. 25, 110 *et seq.*)

A claim of privilege does not warrant a refusal to be sworn. The Claim of party claiming it must submit to be sworn, and interpose his privilege exempt from when a question is asked that invades it. (*In re Woodward et al.*, 3 B. R. 719).

An attorney is not privileged from answering as to everything which comes to his knowledge while he is acting as attorney. The privilege only extends to information derived from his client as such. He must answer questions in regard to acts which might have been performed equally as well by any mere agent or third party, such as conveyances of land to and by him. (*In re Belis et al.*, 3 B. R. 199; s. c., 3 Bt. 386), on the superintendence of an auction sale and disposition of the proceeds. (*In re O'Donohue*, 3 B. R. 245.) These are his own proceedings, and not something that his clients communicated to him. They are not professional, and do not appertain to the duty of an attorney. Whatever is done in this behalf is not in his capacity of attorney or counsel, but is in the character of an agent or third party.

This section replaces sections 109 and 110 of the act of 1869, the first of which provided for the examination of the insolvent at a meeting called for that purpose, and the second for obtaining the order of the court or judge for that purpose upon an *ex parte* petition. This order would not appear to be necessary under the present section, which provides for the examination of the insolvent as the judge, assignee, inspectors, or creditors may require. *Sembler* he would be bound to attend to a reasonable notice to that effect given him by any of these

**26.** The court or judge may also on the application of the Assignee, of the Inspectors, or of any creditor, order any other person, including the husband or wife of the Insolvent, to appear before the court or judge or the

Examination of wife or husband of Insolvent.

\* "upon oath" - A note to be sworn on.  
39 Weeks 50. 6.5.

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**SEC. 26.** the Assignee, to answer any question which may be put to him or her touching the affairs of the Insolvent and his conduct in the management of his estate; and in case of refusal to appear ~~and~~ to answer the questions submitted, such person may be committed and punished by the court or judge as for a contempt of court.  
See notes to previous section.

Examination of bankrupt's conduct. A person summoned as a witness cannot refuse to give evidence respecting his own dealings with the insolvents, by alleging that he is a creditor. (*In re Hamilton*, 1 L. J. N. S. 52, C. C. Logie, Rob. & J. Dig., 451.)

A witness appearing upon an order granted by the judge under sec. 10, sub. s. 4 of the act of 1864 is not bound to be sworn until his expenses are paid. (*Worthington v. Taylor*, 10 L. 304, C. C. Logie, Rob. & J. Dig., 451.) See s. 113 *post*.

A mere witness cannot have the assistance of counsel. (*In re Fredenburg*, 1 B. R. 268; s.c., 2 Bt. 133; *in re Peinberg et al.*, 2 B. R. 475; s.c. 3 Bt. 162; *in re Stuyvesant Bank*, 7 B. R. 445.)

**Bankrupts' wife.** The question has never yet been raised, but it would seem that the examination of a witness and of the bankrupt's wife are limited to and extend to the same subjects. (*In re Stuyvesant Bank*, 7 B. R. 445.) It has, however, been said that if the purpose of the examination be to elicit facts to be used in opposing the bankrupt's discharge, it is not competent for the register to summon any witness or person who may know or be suspected of knowing facts pertinent, or that might be serviceable in the preparation of specifications. In regard to such facts, a creditor should be left to establish them upon the trial of the issues, as parties do in ordinary trials at law. Such information no one has the right to demand or obtain otherwise than as it may be voluntarily given, unless it be upon the trial of issues or question made up. (*In re Brandt*, 2 B. R. 215.)

#### ASSIGNEES AND INSPECTORS.

**Appointment of official assignee.** **27.** The Governor in Council may appoint in the several Provinces of Canada, except the Province of Quebec, one or more persons to be Official Assignee or Assignees or Joint Official Assignee in and for every county; and in the Province of Quebec, such appointment of an Official Assignee, or Official Assignees, or Joint Official Assignee shall be made in and for each

Ontario.  
Quebec.

**SEC. 27.**  
 judicial district in the Province, except that in each of the Judicial Districts of Quebec, Montreal, and St. Francis respectively, such appointment may be made either <sup>Official Assignees.</sup> for the whole district or for one or more electoral districts in the same; and the word "district" shall mean <sup>District, what to be.</sup> either a judicial or an electoral district as the context may require.

By this section the appointment of the official assignees is placed in the hands of the Government instead of the Boards of Trade, in which it was vested under the acts of 1864 and 1869. This change is one of doubtful policy, both because it removes from the control of the commercial body a matter of essential interest to it, and of which that body would naturally be the best judges, and because it tends to increase the government patronage already too great and too often abused. This patronage forms, especially at elections, a lever so powerful in the hands of whichever may be the party in power, as to give it an undue weight, and other sources of strength besides the merits of its principles.

In the United States the warrant in bankruptcy, issued in cases either of voluntary or involuntary assignment, is directed to the marshal of the district, and he performs similar duties to those incumbent upon the official assignees under this act. The marshal being an officer existing, no increase of government patronage is created by the U. S. act; and in the same way had the sheriffs and their deputies in the different districts and counties been *ex officio* the official assignees required under the present act, no complaint could have been made that the government were endeavoring by this act to increase their power in the country.

The following are the names of those who have been appointed official assignees under this Act up to the 1st September, 1875:

**ONTARIO :**

Algoma—Not yet appointed.

Brant—Thomas Botham, of Brantford.

Bruce—George Gould, of Walkerton, Paul McInnes, of Teeswater, and Wm. M. Smith, of Paisley.

Carleton, including the City of Ottawa—Wm. Fingland, Francis Clemow, and D. S. Eastwood, all of Ottawa.

Dundas—K. Matthews, of Morrisburg.

Durham—Wm. Thompson, of Bowmanville, and Seth Smith, of Port Hope.

Elgin—Collin Munro, of St. Thomas.

Essex—Wm. McRea, of Windsor.

Frontenac, including the City of Kingston—C. V. Price, Kingston.

**SEC. 27.****Official As-signees**

- Glengarry—D. McLellan, Williamstown.  
 Grey—George P. Rice, Owen Sound.  
 Grenville—Thos. Tracy, Prescott; E. H. Whitmarsh, Merrickville.  
 Haldimand—Fred. G. A. Henderson, Cayuga.  
 Halton—David Watson Campbell, Milton.  
 Hastings—W. B. Roblin and John P. Thomas, Belleville.  
 Huron—Robt. Gibbon, Goderich; S. E. McCaughrin, Seaforth.  
 Kent—H. F. Cummins and Hy. Black, of Chatham.  
 Lambton—W. T. Keays and Jos. Flintoft, jr., of Sarnia.  
 Lanark—Gemmill, of Almonte, and W. W. Bell, of Carleton Place.  
 Leeds—John N. Abbott and N. Marshall, of Brockville.  
 Lennox and Addington—W. F. Stall and E. A. Derochee, of Napanee.  
 Lincoln—Jas. McEdward, St. Catharines.  
 Middlesex, including the city of London—P. Read and Henry E. Nelles, joint official assignees, and Thomas Churcher, of London.  
 Muskoka District—Thos. Bowerman, of Bracebridge.  
 Nipissing District—Not yet appointed.  
 Norfolk—A. J. Donley, Simcoe.  
 Northumberland—A. Sars, of Colborne, and E. A. McNockten, of Cobourg.  
 Ontario—J. S. M. Wilcox, of Whitby, and A. T. Dutton, of Uxbridge.  
 Oxford—G. Perry, Woodstock.  
 Parry Sound District—Not yet appointed.  
 Peel—Edward A. Haggard, Campbell's Cross.  
 Perth—John Hosser and Thos. Miller, of Stratford.  
 Peterboro'—Jos. A. Hall, Peterboro'.  
 Prescott—Jos. Pendleton,—Wells, Vankleek Hill.  
 Prince Edward—William Carter, Picton.  
 Renfrew—John B. MacDonald, of Renfrew, A. J. Fortier, of Pembroke, Jos. Bell, of Arnprior, and Russell N. Dunning, of Cumberland.  
 Simcoe—Joseph Rogers and T. C. McConkey, of Barrie.  
 Stormont—D. R. McIntyre and Donald McDonnell, of Cornwall.  
 Victoria—Geo. Kempt, Lindsay.  
 Waterloo—A. McGregor, of Galt, and M. Eby, of Berlin.  
 Welland—Fletcher Swayze, Welland.  
 Wellington—Joseph Shaw, Orangeville, John Smith, Elora.  
 Wentworth, including the City of Hamilton—Alex. Davidson, R. L. Gunn, A. J. McKenzie, of Hamilton, and F. D. Suter, of Dundas.  
 York, including the City of Toronto—Wm. Thomas Mason, J. B. Boustead, Jno. Kerr, and Wm. F. Munroe, all of Toronto.

**QUEBEC:**

Arthabaska—Simon Fraser, Lavenir, Octave Ouellet, Somerset;  
— Rainville, St. Christopher.

**SEC. 27.**

Official As-  
signees.

Beauce—David Doran, of St. Joseph de la Beauce.

Beauharnois—Owen Lynch, Beauharnois.

Bedford—Peter Cowan, Nelsonville, and Thos. Brassard, of Waterloo.

Chicoutimi—J. A. Gagné, Chicoutimi.

Gaspé—Chas. H. T. Burman, Barachois.

Iberville—L. A. Auger, St. G. D'Iberville.

Joliette—Adolph Magnan, Joliette.

Kamouraska—J. E. Poullot, Fraserville.

Montmagny—T. S. Michaud, St. Jean Port Joli, and Fred. Belanger, of Montmagny.

Montreal, except City—C. Beausoleil, Montreal.

Montreal City—Jas. Court, Ths. S. Brown, Andrew B. Stewart, Jas. Tyre, Ed. Evans, Jno. Fair, O. Lecourse, L. J. Lajoie, David J. Craig, A. Doutre, Arthur Perkins, Wm. Rhind and Louis Dupuy.

Ottawa—F. S. Mackay, Papineauville, A. Bourgeau, Aylmer, D. C. Simon, Hull, Louis M. Coutlée, Aylmer.

Quebec, except Levis and Lotbinière, Owen Murphy, Wm. Walter, O. Roy and J. Auger, all of Quebec.

Richelieu—N. Gladier, St. François Du Lac, A. E. Brassard, Sorel.

Rimouski—E. Coté, St. Luce.

Saguenay—E. Angers, Murray Bay.

St. Francis, excepting Compton, Stanstead, Richmond and Wolfe

—Chas. J. L. Bacon and G. B. Loomis, Sherbrooke.

St. Hyacinthe—M. E. Bernier, St. Hyacinthe.

Terrebonne—G. M. Provost, Terrebonne.

Three Rivers—Chas. D. Hebert, Yamachiche; A. O. Houle, St. Celestin, J. B. O. Dumont, Three Rivers.

Levis and Lotbinière—Alfred Lemieux, Levis.

Compton—H. G. H. Chagnon, Coaticoode.

Richmond and Wolfe—Wm. Brooke, Richmond.

**NOVA SCOTIA:**

Annapolis—Richard John, of Uniacke.

Antigonish—Archibald McGillivray.

Cape Breton—Chas. W. Hill.

Colchester—Jos. K. Blair.

Cumberland—Harry Baker.

Digby—G. Henderson.

Guysboro—Wm. Hartporn, of Guysboro.

Halifax, including the city—Wm. Creighton.

Hants—Thos. Ayward.

**SEC. 27.** Inverness—G. C. Lawrence.

Kings—E. J. Cogswell.

Official assignees. Lunenburg—Henry S. Jost, Lunenburg.

Pictou—Wm. G. Glennie.

Queens—Wm. Ford.

Richmond—Jno. H. Rindress.

Shelburne—Sam. A. Cox.

Victoria—Alex. Taylor.

Yarmouth—Stephen Murray.

**NEW BRUNSWICK :**

City and County of St. John—E. McLeod, St. John.

Albert—G. Coihaun, of Hopewell.

Cape Carleton—D. C. Courser, of Fredericton.

Charlotte—G. S. Hill, Charlotte.

Gloucester—Rob. Ellis, Jr.

Kent—Thos. W. Bliss.

Kings—John E. B. McReady.

Queens—Caleb F. Fox, Gagetown.

Northumberland—John Gillis.

Restigouche—W. S. Smith.

Sunbury—Geo. Seelay, of Fredericton.

Victoria—Peter O'Byron.

Westmorland—Jno. McKenzie, of Moncton.

York—E. B. Winslow.

**MANITOBA :**

Provencher—Robert Strange, of Winnipeg.

Lisgar—Not yet appointed.

Selkirk, including Winnipeg—John Balsillie, of Winnipeg.

Marquette—Sam. R. Marlatt, of Portage Laprairie.

**PRINCE EDWARD ISLAND :**

Kings—P. J. Ryon.

Prince—David Montgomery.

Queens—Francis L. Hasseard.

In England the Court appoints a receiver at any time after the presentation of the petition to have the trader declared a bankrupt, and this receiver holds the property till the appointment of a trustee by the creditors, Imp. Stat, 32 & 33 Vic. (1869) cap. 71, s. 13.

Security given  
by official  
assignee.

**28.** Each person so appointed Assignee or Joint Assignee shall hold office during pleasure, and before acting as such shall give security for the due fulfilment and discharge of his duties in a sum of two thousand

I recordd afterwards that when any person  
appointed assignee or joint assignee under the provisions of the 27 section has given  
security for the due fulfillment and discharge  
of his duties required by the preceding  
part of this section, that any  
person who has become security in  
that behalf, when no longer disposed to  
continue his suretyship, may give  
notice thereof in writing to his principal  
and also to the Secretary of State of Canada  
and all accruing responsibility on the  
part of such person as such surety  
shall cease at the expiration of 3 months  
from the receipt of the last of such  
notices or upon the acceptance by the  
Crown of the security of another surety  
but if it appears to the Governor in  
Council that the period so limited for  
giving the security of a new surety is  
for any reason, insufficient, the Governor  
in Council may allow such fur-  
ther period for giving the security of a  
new surety as appears to him proper,  
but such extended period shall in no  
case exceed 3 months beyond the one  
month within which such new security  
is required to be given as above men-  
tioned; and this proviso, shall apply  
to the case of any new security which  
may from time to time, be given.

shall seem reasonable, both as  
to the furnishing of securities and as  
to the costs of the application -

39 Vict: Chap 30 S.S. 6 & 7

## SEC. 28.

dollars, if the population of the county or district for which he is appointed does not exceed one hundred thousand inhabitants, and in the sum of six thousand dollars if the population exceeds one hundred thousand, —such security to be given to Her Majesty for Her benefit and for the benefit of the creditors of any estate which may come into his possession under this Act; and in case any such Assignee fails to pay over the moneys received by him or to account for the estate, or any part thereof, the amount for which such Assignee may be in default may be recovered from his sureties by Her Majesty or by the creditors or subsequent Assignee entitled to the same, by adopting, in the several Provinces, such proceedings as are required to recover from the sureties of a sheriff or other public officer;

*Recovery of  
security*

*Provided* 

a. The Official Assignee may also be required to give additional security in any case of Insolvency such further security as, on petition of a creditor, the court or judge may order, —such additional security being for the special benefit of the creditors of the estate for which the same shall have been given.

b. The Official Assignee shall be an officer of the court having jurisdiction in the county or district for which he is appointed. He shall as such be subject to its summary jurisdiction, and to the summary jurisdiction of a judge thereof, and be accountable for the moneys, property and estates coming into his possession as such Assignee, in the same manner as sheriffs and other officers of the court are.

*Responsibility  
&c., of official  
assignee*

“A judge in the Province of Quebec cannot interfere with Insolvency proceedings originated in Ontario, where the insolvent has his domicile, even though the Assignee reside in the Province of Quebec, and the affairs of the estate be conducted in Montreal, *McDonald and Tyre and Kenny*, 15 L. C. Jurist, p. 145.

29. The creditors at their first meeting or at any subsequent meeting called for that purpose, may appoint an Assignee who shall give security to Her Majesty in manner, form and effect, as provided in the next preceding section, for the due performance of his duties to such

*Appointment of  
and security to  
be given by as-  
signee not  
official*

**SEC. 29.** an amount as may be fixed by the creditors at such meeting. In default of such appointment the Official Assignee shall remain the Assignee of the estate, and shall have and exercise all the powers vested by this Act in the Assignee. The creditors may also at any meeting called for that purpose, remove any Assignee and appoint another in his stead. A certified copy of any resolution of the creditors appointing an Assignee shall be transmitted in every case to the clerk of the court wherein the proceedings are pending, to remain of record in his office.

**What creditors only shall vote at meetings.**

No creditor shall vote at any meeting unless present personally or represented by some person having a written authority, to be filed with the Assignee, to act at any or all such meetings on his behalf and no more than one person shall vote as a creditor on any claim for the same debt; persons purchasing claims against an estate after insolvency, shall not be entitled to vote in respect of such claims, but shall, in all other respects, have the same rights as other creditors; and no claim after being proved shall be divided and transferred to another person or party to increase the number of votes at any meeting: each claim shall continue to have one vote only in number.

As to the mode of voting for the appointment of an assignee, see sec. 102 *post.*

**Who may be appointed.** The creditors under this section may appoint any person they choose whether resident where the insolvent has his place of business or not, and he need not be a creditor.

An attorney for a creditor may be assignee (*in re Barrett* 2 B. R. 533; S. C. 1 C. L. R. 202; S. C. 1 L. T. B. 144; *in re Lawson* 2 B. R. 396). The attorney of the bankrupt may be chosen assignee, but he cannot occupy the position of council and assignee at the same time. He will have to withdraw from the former, (*in re Clairmont* 1 B. R. 276, S. C. 1 L. T. B. 6.)

**Individual as well as partnership creditors may vote.** At a meeting of creditors held for the purpose of giving their advice upon the appointment of an official assignee of a partnership estate, it was held that the creditors of the individual partners, as well as the creditors of the firm, had the right to vote in the choice of an assignee, (*Luxton v. Hamilton & Davis*, 10 L. J., U. C. 334. C. C. Logie. Rob. & J. Dig. 413)

The assignee appointed by the creditors is by the 125 section placed SEC. 29. under the summary jurisdiction of the judge.

The assignee appointed at this meeting may subsequently be removed, either by the creditors at a special meeting called for the purpose, or by the judge on petition for cause.

Lord Hardwicke stated the rule as to removal to be, that the Removal of assignees ought to be continued unless the petitioners seeking their removal could shew that there was some objection with regard to the substance or the integrity of the persons who are chosen assignees, (*ex parte Greynier*, 1 Atk. 91); as where the party chosen has an interest adverse to that of the general body of creditors, (*ex parte Caudy*, M. & McA. 198); or is an accounting party to the estate (*ex parte Bates*, 1 Bank & Ins. Rep. 285).

The Court will set aside the choice of the creditors, and direct a new Court will, for one to be made, if the parties voting in the choice be not entitled to vote, (*ex parte Rowe*, DeG. Rep. 111), or, if a person, who is liable to account to the bankrupt's estate, be the only one who has proved, and elect himself, (*ex parte Grimsdale*, 28 L. T. Rep. 207); or if the bankrupt have interfered in the choice, (*ex parte Molineux*, 3 M. & A. 703); or may exercise an undue influence over the party chosen, (*ex parte Morse*, DeG. 478); or if the choice have been procured by fraud, (*ex parte Surtees*, 12 Ves. 10). In the last cited case, Lord Eldon said, "It is a general rule that the appointment of assignees will not be disturbed when chosen by those who can make immediate proof, although those who may not have been prepared to do so would have turned the scale." (See also *ex parte Wooley*, 1 G. & J. 366; *ex parte Butterfill*, 1 Rose, 195). But where the majority of the creditors were accidentally excluded from voting in the choice, (*ex parte Dechapeaurouge*, M. & M. C. A. 174); or had not sufficient notice to enable them to be present, (*ex parte Morris*, 1 Dea. 498), a new choice will be directed. So also where the assignee had been chosen without his consent or knowledge, and declined to act, (*ex parte Pearson*, 3 Dea. 324).

The removal of an assignee is a matter in the discretion of the court. Such discretion is, however, a legal discretion, and can only be exercised to remove an assignee when cause is shewn rendering such removal expedient or necessary. (*In re Blodgett & Sandford*, 5 B. R. 472; *in re Mallory*, 4 B. R. 153; s. c. 2 L. T. B. 130.)

Upon a petition to remove the assignee for misconduct in instituting a suit, the question is not whether the suit was without a proper legal foundation, but whether its prosecution was fraudulent, malicious, or from unjust motive, and not in good faith for the benefit of the general creditors. (*In re Sacchi*, 6 B. R. 398; s. c. 6 B. R. 497; s. c. 43 How. Pr. 250; s. c. 4 C. L. N. 289.)

**SEC. 29.** If one creditor becomes the sole creditor by the purchase of all the other claims, a new assignee may, upon the application of the bankrupt and such sole creditor, be substituted for the one originally elected by the creditor. (*In re Sacchi* 6 B. R. 398; s. c. 6 B. R. 497; s. c. 43 How. Pr. 250; s. c. 4 C. L. N. 289.)

When creditors apply to an assignee to ascertain the condition of the estate, it is his duty to communicate all material facts within his knowledge, and the wilful suppression of such facts is a ground for removal. (*In re Perkins*, 8 B. R. 56.)

Such removal will be made where there is an irreconcileable disagreement between the assignee and a large portion of the creditors. The assignee is a trustee of each and every creditor. He receives a compensation for his services, and is held to strict diligence in watching the interest of the creditors. The creditors are the beneficiaries of the Court, and have a direct pecuniary interest in the bankruptcy proceedings.

**Legal adviser of estate.** Erroneous legal advice, when the errors are so gross and frequent as to be evidence of the incompetency of the legal adviser he has chosen, may be cause for ordering the assignee to employ other counsel, but not necessarily for removing the assignee. (*In re Blodgett & Sandford*, 5 B. R. 472.)

The assignee was under the old act held to have the sole right to select his own professional adviser, and could not be made to change him, except upon reasonable ground; (*In re Lamb*, 17 C. P. 173. Rob & J, Dig. 418,) but section 43 of the present act places the appointment in the hands of the creditors,

**After vote of creditors, court will still maintain right to interfere.** After a majority of the creditors have voted to remove an assignee, the court will exercise a judicial discretion in the matter, notwithstanding the action of the creditors. Parties opposed in interest to the official action of an assignee, do not have the power to dictate his conduct, even if they happen to command a majority vote of the creditors themselves. It is not the intention of the law that the majority should have the absolute control over the rights and interest of the minority. (*In re Dewey*, 4 B. R. 412; s. c. Lowell, 493; s. c. 2 L. T. B. 134.) Bumps, p. 436.

If an assignee be guilty of any misconduct, or misbehave himself in the trust reposed in him, he will be removed and ordered to pay the costs consequent upon his removal, (*ex parte Angle*, 4 D. & C. 118). So an assignee may be removed where he improperly connives at the insertion in the insolvent's balance sheet of a petitioner's debt, or when the assignee becomes insolvent, (*ex parte Perryer*, 1 M. D. & D. 276; *ex parte Surtees*, 12 Ves. 10); but the petition

must be presented promptly (*ex parte Coslett*, 1 Moll. 62). Mere poverty, though of itself not a sufficient ground of removal, yet if attended by suspicious circumstances, as the use of fictitious votes in the assignee's election, will warrant a removal, (*ex parte Copeland*, 1 M. & A. 305). As stated already, the Court will remove an account-<sup>and removal of</sup> ing party to the estate from the office of assignee, (*ex parte Mendel*, 4 D. & C. 725; but see *ex parte Doyle*, 2 Moll. 149). Where an assignee, acting under a *bonâ fide* belief that all the other creditors were to be compounded with, agreed with the bankrupt to compromise his own debt, the court declined to remove him, (*ex parte Davison*, 2 Bank. & Ins. Rep. 89.) Edgar, *Act of 1869*.

If an assignee abscond, or become permanently resident out of the country, another will be chosen in his place, (*ex parte Higgins*, 1 Ba. L. B. 218; *ex parte Grey*, 13 Ves. 274). By the English Act of 1861, sec. 124, continued residence out of England for three months, is a sufficient reason for removing an assignee. Edgar, *Act of 1869*.

Appointment of agent for a creditor claiming to advise in the choice of an assignee must be in writing, and filed of record, (*in re Campbell* 1 L. J. (N. S.) 135, C. C. Hughes; Rob. & J. Dig. 413).

Held, that the plaintiff having proved his claim before the assignee, and having obtained an order in this Court to set aside the insolvent's discharge in the Insolvent Court, with costs to be paid to him out of their estate, was precluded from objecting that the assignee was not duly appointed, (*Allan v. Garratt et al.*, 30, Q. B. 165; Rob. & J. Dig. 414).

Where, at a meeting held for the purpose of appointing an assignee ~~Conflict between majorities in number and value~~, the majority in number of the creditors vote for one party, and the majority in value for another, it has been decided by His Honor Judge ~~in number and value~~. Walters of the St. John, New Brunswick, County Court, that there is no election, and, consequently, the interim assignee becomes assignee. This decision was made at Chambers.

**30.** As soon as the security required from the Assignee appointed by the creditors shall have been furnished <sup>Transfer of estate by Official Assignee.</sup> by him, it shall be the duty of the Official Assignee to account to him for all the estate and property of the Insolvent, which has come into his possession, and to pay over and deliver to him all such estate and property, including all sums of money, books, bills, notes and documents whatsoever belonging to the estate, and to execute in his favor a deed of assignment in the Form H.

**SEC. 30.** The powers conferred on the assignee by his appointment are to be found in sec. 38, *post.*

Failure to carry out the provisions of this section would be punished and compliance enforced, if necessary by imprisonment, on petition, to the Court or judge after notice, the official assignee being an officer of the court and subject to its summary jurisdiction; (v. sec. 28, subs. *b. ante.*, sec. 125 *post*).

## FORM H.

### INSOLVENT ACT OF 1875.

In the matter of A. B., an Insolvent.

**Transfer of estate to assignee** This deed of release (*or transfer*) made under the provisions of the said Act between C. D., Assignee to the estate of the said Insolvent of the first part; and E. F., of the second part, witnesseth :

That whereas, by a resolution of the creditors of the Insolvent duly passed at a meeting thereof duly called and held at , on the day of

, the said party of the second part was duly appointed Assignee to the estate of the said Insolvent: Now therefore these presents witness that the said party of the first part, in his said capacity, hereby releases (*or transfers*) to the said party of the second part the estate and effects of the said Insolvent, in conformity with the provisions of the said Act; and for the purposes therein provided.

In witness whereof, &c.

(*This form may be adopted in the Province of Quebec to the notarial form of execution of documents prevailing there.*)

**Notice of appointment.**

**31.** Every Assignee on his becoming such shall give notice of his appointment as such by advertisement in the Form I, and by a copy thereof sent to each creditor by post and post-paid.

The inspectors may direct as to the time and manner of this advertisement, (v. sec. 101 *post*.)

## FORM I.

SEC. 33.

## INSOLVENT ACT OF 1875.

In the matter of

Form of notice.

A. B. [or A. B. & Co.,]  
an Insolvent.

I the undersigned [*name and residence*], have been appointed assignee in this matter.

Creditors are requested to file their claims before me, within one month.

(Place      date,)

(Signature)

Assignee.

**32.** No Assignee shall act as the attorney or agent of any creditor in reference to any claim or demand of such creditor on an insolvent estate of which he is the Assignee.

**33.** An Assignee may however, on being authorized by the judge, act as the attorney or agent of a creditor when the action to be taken is in the interest of the estate or of the creditors generally.

**34.** The creditors may, from time to time, at any meeting, determine where subsequent meetings shall be held; and until they shall have passed a resolution to that effect, all meetings of the creditors shall be held at the office of the Assignee, unless otherwise ordered by the judge.

**35.** The creditors at any meeting may appoint one or more Inspectors, who shall superintend and direct the proceedings of the Assignee in the management and winding up of the estate; and they may also at any subsequent meeting held for that purpose, revoke the

**SEC. 35.** appointment of any or all the said Inspectors; and upon such revocation, or in case of death, resignation or absence from the Province of such Inspectors may appoint others in their stead; and such Inspectors may be paid such remuneration as the creditors may determine ; and whenever anything is allowed or directed to be done by the Inspectors, it may or shall be done by the sole Inspector, if only one has been appointed. But no Assignee as Inspector of any insolvent estate shall purchase directly or indirectly any part of the stock in trade, debts or assets of any description, of such insolvent estate.

**Remuneration  
of Inspectors;  
they and as-  
signee not to  
purchase insol-  
vent's property.**

The provision in reference to the appointment of Inspectors is taken from the Act of 1869, in the working of which it has been found of great advantage, both as affording a salutary check on the assignee, and at the same time providing a less cumbrous and expensive machinery for dealing with questions connected with the estate too important to be left to the sole discretion of the assignee than was to be found in a special general meeting of creditors.

In England prior to the passing of the Act 32 & 33 Vic. c. 71, Inspectors were only appointed in cases where there were several classes of creditors, joint and separate, to watch the interests of each, and prevent any undue influence, and to see that the partnerships property went to the partnership creditors and the private property to the private creditors. By the Act cited, however, provision is made in sec. 14, for the appointment of a committee of five inspectors, and reference may now be had to the decisions of the English courts as affording light on this branch of the subject.

The voting on the remuneration of the Inspectors shall take place in accordance with the terms of sec., 2, subs. h, and sec. 29 *ante*.

Assignees will not be permitted, either directly or indirectly, to become purchasers of any of the insolvent's property, v. sec. 35 *post*. (*Ex parte Badcock*, M. & McA., 231, 238); and any assignee so purchasing without leave of the Court, will be removed, and ordered to account, for the profits, (*ex parte Alexander*, 1 Dea. 273); but see (*ex parte Thomson*, 9 L. J. Chy., 17), where the purchase of a small portion only of the estate by the assignee did not justify his removal.

**Assignees may  
not purchase  
insolvent's pro-  
perty.**

Where there was no doubt of the respectability of an assignee, and the creditors were desirous of continuing him in his office, and had given their sanction to the application, he was permitted to bid at the sale of the bankrupt's estate, (*ex parte Moreland*, M. & McA., 76; Anon., 2 Russell, 350.)

## SEC. 35.

If an assignee wish to purchase at any sale of the insolvent's property, he must first petition the Court to be discharged from his office, (*ex parte Alexander*, 1 Dea. 273), when the Court will make the order, but the petitioner must pay his own costs of the petition, (*ex parte Perkes*, 3 M. D. & D. 385). This petition must be served on the insolvent, and in England, where there is often more than one assignee, upon the co-assignee, (*ex parte Bage*, 4 Madd, 459); here no doubt the inspector should be notified. Edgar, *Act of 1869*.

**36.** The creditors may, at any meeting, pass any resolution or order directing the Assignee how to dispose of the estate, real or personal, of the Insolvent; and, in default of their doing so, the Assignee shall be, subject to the directions, orders and instructions he may from time to time receive from the Inspectors, with regard to the mode, terms and conditions on which he may dispose of the whole or any part of the estate.

The power given to the inspectors by this section is somewhat different than that given by sec. 34 of the Act of 1869, where all the powers of the creditors were conferred upon them, except in cases of the sale of the entire estate, and subject to the revision of the creditors. Here the only restriction on the exercise of their powers is that provided in the following section:

**37.** Any one or more creditors whose claims in the aggregate exceed five hundred dollars, who may be dissatisfied with the resolutions adopted or orders made by the creditors or the Inspectors, or with any action of the Assignee for the disposal of the estate or any part thereof, or for postponing the disposal of the same, or with reference to any matter connected with the management or winding up of the estate, may, within twenty-four hours thereafter, give to the Assignee notice that he or they will apply to the Court or judge, on the day and at the hour fixed in such notice and not being later than forty-eight hours after such notice shall have been given, or as soon thereafter as the parties may be heard before such Court or judge, to rescind such resolutions or orders. And it shall be lawful for the Court or judge, after hearing the Inspectors, the Assignee and creditors present at the time and place so fixed, to approve, rescind or mod-

Assignees may  
not purchase  
*ex insolvent's pro-*  
perty.

Disposal of  
estate of insol-

Objections to  
proposed mode  
of disposal of  
estate.

Hearing by  
court or judge

**SEC. 37.** ify the said resolutions or orders. In case of the application being refused the party applying shall pay all costs occasioned thereby, otherwise the costs and the expenses shall be at the discretion of the judge.

This provision is new and takes the place of the revision by the creditors provided for in s. 34 of the Act of 1869. One clear day's notice of this application would probably be required at least in the province of Quebec, unless the matter was of such a nature that such delay would be fatal.

Powers of insolvent vested in assignee.

**38.** The Assignee shall exercise all the rights and powers of the Insolvent in reference to his property and estate. And he shall wind up the estate of the Insolvent, by the sale, in the ordinary mode in which such sales are made, of all bank or other stocks, and of all movable property belonging to him, by the collection of all debts or by the sale of the estate of the Insolvent, or any part thereof, if such be found more advantageous, at such price and on such terms as to the payment thereof as may seem most advantageous.

Proviso as to sale of entire estate.

Provided that no sale of the estate *en bloc* shall be made without the previous sanction of the creditors given at a meeting called for that purpose: and provided also that no such sale shall affect, diminish, impair or postpone the payment of any mortgage or privileged claim on the estate, or property of the Insolvent, or on any portion thereof.

The creditors are not bound to accept the highest tender for the assets of an insolvent estate, sold under section 41 of the Act, and are free to act as they deem best for the interest of the estate, (*in re McCarville*, insolvent; and *Lajoie*, assignee, and *Hudon et al.*, petitioners, S.C.) 18 L. C. J. p. 139.

Assignee to sue for debts due Insolvent.

**39.** The Assignee, in his own name as such, shall have the exclusive right to sue for the recovery of all debts due to or claimed by the Insolvent of every kind and nature whatsoever; for rescinding agreements, deeds and instruments made in fraud of creditors, and for the recovery back of moneys alleged to have been paid in fraud of creditors, and to take, both in the prosecution and

defence of all suits, all the proceedings that the Insolvent might have taken for the benefit of the estate, or that any creditor might have taken for the benefit of the creditors generally: and may intervene and represent the Insolvent in all suits or proceedings by or against him, which are pending at the time of his appointment, and on his application may have his name inserted therein in the place of that of the Insolvent. And if after an assignment has been made or a writ of attachment has issued under this Act, and before he has obtained his discharge under this Act, the Insolvent <sup>If insolvent  
sues for the  
same after  
assignment or  
attachment.</sup> sues out any writ or institutes or continues any proceeding of any kind or nature whatsoever, he shall give to the opposite party such security for costs as shall be ordered by the court before which such suit or proceeding is pending, before such party shall be bound to appear or plead to the same or take any further proceeding therein.

An insolvent's reversionary interest in an estate passes to his assignee, and entitles the assignee to maintain a suit in a proper case or the appointment of new trustees, and for an account of the estate: but the Court refused to make an order for the sale of such reversionary interest, (*Gray v. Hatch*, 18 Chy. 72. Rob. & J. Dig. 417.)

An action may be brought against an assignee for a dividend on a duly collocated and advertised claim which has not been objected to, (*Simpson v. Newton*, 4 L. J. N. S. 46; C. C. Macdonald-Rob. & J. Dig. p. 418.)

*Quære.* Ought not proceeding to be by petition? See sec. 50 of Act of 1869, &c. 125, *post.*

An official assignee in insolvency sued for trespass in taking and selling goods is not entitled to notice of action. So held in accordance with the cases deciding that a sheriff is not entitled to such notice; but Wilson, J., but for these decisions, would have thought otherwise, (*Archibald v. Haldan*, 30 Q. B. 30; Rob. & J. Dig. p. 418.)

A. and B., traders, made an assignment under the Insolvent Act. A judgment at law having been obtained against A., his interest in the partnership assets was sold for a nominal consideration to C., who had notice of the insolvency proceedings. C. then entered into possession of and otherwise interfered with the partnership goods, so as to

**SEC. 39.** hinder the plaintiffs from executing the duties of their office: an injunction was granted, on application of the assignees, to restrain the defendant from further interference (*Wilson v. Corby*, 11 Grant, 92).

**Where insolvent & foreigner** An objection on the ground that the insolvent plaintiff was a foreigner neither resident nor domiciled in Canada, was raised to an application under this provision by an official assignee to be allowed to intervene and represent the insolvent in a suit wherein the insolvent was plaintiff. The point is of much importance, and was raised, though not decided in *Mellon v. Nicholls*, 27 Q. B. U. C. 167. It was considered necessary in the English Act of 1861, sec. 277, to enact that it should extend to aliens and denizens, both to make them subject thereto and to entitle them to all the benefits given thereby.

**If assignee declines to sue, creditor may.** If the assignee decline to prosecute a suit, the creditors are entitled to do so, upon indemnifying the assignee against costs, &c., (10 L. J. (N.S.) 102, and see sec. 68 below.)

A bill filed by one of the creditors of an insolvent to recover property alleged to belong to the insolvent's estate, on the mere allegation that the assignee in insolvency refused to sue without an indemnity against the costs of the suit, and that the plaintiff, through poverty, was unable to give such indemnity, is demurrable, (*Davis v. Snell*, 2 DeG. F. & J. 463).

**Bankrupt need not be made a party.** Even the charge of fraud, in a bill filed against a bankrupt and his assignees, seeking to set aside certain conveyances as having been fraudulently procured by the bankrupt before the bankruptcy, does not justify the making the bankrupt a party, (*Gilbert v. Lewis*, 2 J. & H. 452).

In the same case it was also held, that although a decree declaring the deeds to be fraudulent would in a sense make the bankrupt a trustee of the property, this was not sufficient to make him a proper party to the suit.

Following *Gilbert v. Lewis*, a demurrer by an insolvent, on the ground that he was not a proper party, was allowed in *Wilson v. Chisholm*, 11 Grant, 471; where a bill was filed by assignees under the Insolvent Act to set aside a settlement executed by the insolvent, on the marriage of his daughter, with a secret trust in his own favour, the bill also charging that the insolvent defendant was in the enjoyment of the property. It is remarked in the judgment that "one reason given for allowing parties to a fraud to be made defendants in certain cases, though no relief except costs is prayed against them, is that

the plaintiff may be assured of his costs," and it must be admitted SEC. 39.  
that this reason can seldom be applicable to the case of a bankrupt. Suits by assignee.  
Edgar (1869) p. 74.

On the 10th February, 1873, defendants obtained an order to stay <sup>Severance of  
interest in suit  
pending at time  
of insolvency.</sup> proceedings until security was given for costs, on the ground that the plaintiff had become insolvent. The declaration contained three counts: 1. On a fire policy; 2. In trover, alleging as special damage that plaintiff's business was stopped, and he lost customers; 3. In trespass to goods, alleging similar special damage. No objection was made in Chambers that the causes of action in the second and third counts did not pass to the assignee. On application to the Court:—held, that the causes of action under the first and second counts passed to the assignee; for as to the second, as the conversion, the primary cause of action passed to the assignee, the special damage depended upon it could not be sued for by the debtor; but that the cause of action in the third count did not pass, being for a personal claim of the debtor, independent of his right of property:—Held, therefore, that as to the third count the order should not have been made; that being made without authority it might be rescinded as to that count; and that the action might be stayed on one count leaving it to proceed on the others, (*Smith v. Commercial Union Insurance Co.*, 33 2 B. 529; Rob. & J. Dig. 415.)

When a suit becomes defective by the insolvency of the plaintiff, subsequent proceedings are not wholly void, but on the fact being brought before the Court such order will be made as may be just, (*McKenzie v. McDonnell*, 15 Cly., 442. Rob & J. Dig. 445.)

“—An assignee under the Insolvent Act of 1864 cannot be sued in warranty, in respect of a matter for which the insolvent was liable to guarantee the plaintiff, (*Hutchins et al. vs. Cohen, & Cohen*, pl. in war. v. *Whyte*, 15 L. C. Jurist, p. 235.)

The actions which the insolvent may institute in his own name are those for property which cannot go to his creditors, as damages for personal wrongs, and in the province of Quebec to obtain payment of a bequest declared to be an alimentary and unattachable allowance. v. notes to sec. 16. ante.

In England, an insolvent may maintain an action for personal labour, (*Silk v. Osborne*, 1 Esp. 140; *Williams v. Chambers*, 11 Jur. 798,) he may also sue on after-acquired property, (*Webb v. Fox*, 7 T. R. 391; *Evans v. Brown*, 1 Esp. 170,) or, sue on a contract made with him, unless the assignee interferes, (*Kitchen v. Bartsch*, 7 East,

**SEC. 39.** 53, *Cumming v. Roebuck*, Holt., 172). As to the privilege of subsequent creditors, where an insolvent has been allowed by the assignee and the creditors of his insolvent estate to trade, see *Tucker v. Hernaman*, 17 Jur. 723.

Suits by Insolvent.

The question may here arise whether the insolvent's claim for personal labour performed during the interval between the assignment and discharge, can be attached by the assignee? It would seem a hardship that an insolvent who has committed no fraud, and who may have a large family to support, and whose position may therefore compel him to work, should be unable to recover its value because his estate is in insolvency. Even if fraud had been committed, the insolvent should be allowed to recover the fruits of daily labour sufficient to procure the necessities of life. The statute appears to make no provision for such a contingency, except that prescribed in § whereby a majority of the creditors, representing three-fourths of the liabilities, *may* allow the insolvent a sum of money, or any other property out of the estate. Pop. p. 57.

**Partnership dissolved by insolvency of a partner.** 40. If a partner in an unincorporated trading company or co-partnership becomes insolvent within the meaning of this Act, and an Assignee is appointed to the estate of such Insolvent, such partnership shall thereby be held to be dissolved; and the Assignee shall have all the rights of action and remedies against the other partners in such company or co-partnership, which the said insolvent partner could have or exercise by law or in equity against his co-partners after the dissolution of the firm, and may avail himself of such rights of action and remedies, as if such copartnership or company had expired by efflux of time.

An act of bankruptcy committed by one partner, if followed by an adjudication (in bankruptcy) is a dissolution of the partnership, and all his property becomes vested in the trustee under the bankruptcy who becomes tenant in common of the share of his partnership stock, (*Hague v. Rolleston*, 4 Burr. 2174; *Smith v. DeSylva*, Cowp. 471.)

But the rule of the French law was not the same, v. 4 Pard. Dt. Com. no. 1066.

Register to be kept by official assignee.

41. Every Official Assignee, or Assignee appointed by the creditors, shall, in every case in which he acts as such, keep a register showing the name of each Insol-

vent who has made an assignment, or against whom a writ of attachment has issued, his residence, place of business, and the nature of his trade or business, the date of the assignment, or of the issue of the writ of attachment, the amount of liabilities acknowledged by the Insolvent in his schedule of liabilities, the amount of claims proved, the amount of composition, or of dividends paid, and whether a discharge has been granted within one year or not, the amount of dividends remaining unpaid after three months from the declaration of the last dividend, with such other information as the Assignee may deem of general interest with reference to each estate,—when register shall be open to the inspection of the public, within office hours, at the office of such Assignee; and the Official Assignee, or the Assignee, as soon as he takes charge of any estate, shall open a separate book for each such estate, showing a debtor and creditor account of all his receipts and disbursements on account thereof.

And every Assignee, other than an Official Assignee, shall within one month after he shall have wound up the estate of any Insolvent, and obtained his discharge, deposit the register kept by him as aforesaid, with reference to such estate, in the office of the Official Assignee of the county or district, where it shall remain for the like purposes, and under the same provisions as the register kept by the Official Assignee.

This section differs somewhat from those of the Act of 1869 (38 and 39) bearing on the same subject. This is fuller with regard to the record to be kept of receipts and disbursements, but fails to lay down any rule for a public register of the minutes of all meetings of creditors as was done by the sections referred to.

#### ASSIGNEES' ACCOUNTS, COMMISSION, &c.

**42.** Every Assignee under this Act shall, within thirty days after obtaining his discharge, and every Assignee under any Act hereby repealed shall within thirty days after obtaining his discharge, or the closing of his accounts as such, or within thirty days after the coming into force of this Act, if he has obtained his discharge or

Assignee to  
keep register.

Assignee to  
open separate  
account with  
each estate.

Deposit of re-  
gister by non-  
official assignee

Assignees  
under this or  
any former Act  
must obtain dis-  
charge, and pay  
over balances  
to Receiver-  
General with  
sworn account.

**SEC. 42.** closed his accounts before its coming into force, pay over to the Receiver-General all moneys belonging to the estate then in his hands, not required for any purpose authorized by this Act or any Act hereby repealed, as the case may be, with a sworn statement and account of such moneys, and that they are all he has in his hands, under a penalty of not exceeding ten dollars for each day on which he shall neglect or delay such payment; and he shall be a debtor to Her Majesty for such moneys, and may be compelled as such to account for and pay over the same.

*Assignee to be paid only by commission on amount realized.*

**43.** The Assignee shall be entitled to a commission on the net proceeds of the estate of the Insolvent of every kind, of five per cent. on the amount realized not exceeding one thousand dollars, the further sum of two and a half per cent. on the amount realized in excess of one thousand dollars, and not exceeding five thousand dollars, and a further sum of one and a quarter per cent. on the amount realized in excess of five thousand dollars,—which said commission shall be in lieu of all fees and charges for all his services and disbursements in relation to the estate, exclusive of actual expenses in going to seize and sell, and of disbursements necessarily made in the care and removal of property.

*As to employing counsel, &c.*

No Assignee shall employ any counsel or attorney at law without the consent of the Inspectors, or of the creditors; but expenses incurred by employing such counsel or attorney with such consent, shall be paid out of the estate, if not recovered from any party liable therefor.

*Remuneration of superseded assignee.*

The remuneration of the Official Assignee, when he is superseded by an Assignee appointed by the creditors, shall be fixed by the Court or judge and taxed by the proper officer, and shall be the first charge on the estate.

The question of the remuneration of the assignee has been found, to judge from the frequent changes of legislation on the subject, a difficult one to deal with. The present section aims at a precision not attempted by either of the former Acts or any of their amendments.

*Assignee to call meetings on requisition.*

**44.** The Assignee shall call meetings of creditors whenever required in writing so to do, by the Inspectors

or by five creditors or by the judge, and he shall state SEC. 44. succinctly in the notice calling any meeting the purpose Assignee to call meetings.

The power given to a judge to require a meeting of creditors to be called, enables one creditor, on petition and for cause, to obtain such a meeting even when the other creditors and the inspectors refuse to assist him.

**45.** The Assignee shall deposit at interest in some chartered bank, to be indicated by the Inspectors or by the judge, all sums of money which he may have in his hands belonging to the estate, whenever such sums amount to one hundred dollars. Such deposit shall not be made in the name of the Assignee generally, on pain of dismissal, but a separate deposit account shall be kept for each estate of the moneys belonging to such estate, in the name of the Assignee and of the Inspectors (if any,) and such moneys shall be withdrawn only on the joint cheque of the Assignee and of one of the Inspectors, if there be any.

The interest accruing on such deposits shall appertain to the estate, and shall be distributed in the same manner and subject to the same rights and privileges as the capital from which such interest accrued.

If in any account or dividend sheet made subsequent to any deposit in a bank, the Assignee omits to account for or divide the interest then accrued thereon, he shall forfeit and pay to the estate to which such interest appertains, a sum equal to three times the amount of such interest ; and he may be constrained so to do by the judge upon summary petition and by imprisonment as for a contempt of Court.

At every meeting of creditors, the Assignee shall produce a bank pass-book showing the amount of deposits made for the estate, the dates at which such deposits shall have been made, the amounts withdrawn and dates of such withdrawal, of which production mention shall be made in the minutes of such meeting, and the absence of such mention shall be *prima facie* evidence that it was not produced thereat. The Assignee shall also produce

**SEC. 45.** such pass-book whenever so ordered by the judge at the request of the Inspectors or of a creditor, and on his refusal to do so he shall be treated as being in contempt of Court.

Punishment for  
false entry in  
such pass-book

The Assignee who shall make or cause to be made any false entry in such pass book with a view to deceive the Inspectors, creditors, or judge, shall be guilty of a misdemeanor, and shall be liable, at the discretion of the Court before which he shall be convicted, to punishment by imprisonment for a term not exceeding three years, or to any greater punishment attached to the offence by any statute.

Estate in whom  
vested on death  
of assignee.

**46.** Upon the death of an Assignee or Official Assignee, or upon his removal from office, or upon his discharge, the estate shall remain under the control of the judge until the appointment of another Assignee or Official Assignee as the case may be, when the estate shall become vested in such other Assignee or Official Assignee.

The question arises in connection with this section as to what course should be followed during such interval should it be found necessary to adopt conservatory or other legal proceedings requiring despatch. The fact of the estate being under the control of the judge would scarcely seem sufficient to enable such proceedings to be taken in his name, and in many instances his order would be inadequate. It is to be feared that it will be found that an amplifying amendment will be required in connection with this section.

The new appointment will be made in the usual manner at a meeting called for the purpose, by the order of the judge, *ex mero motu*, or on the petition of any creditor. This procedure was also followed in the case of an absconding assignee, See Sauvageau cases, Montreal 1871.

Final account  
and discharge of  
assignee.

**47.** After the declaration of a final dividend, or if after using due diligence the Assignee has been unable to realize any assets to be divided, the Assignee shall prepare his final account, and present a petition to the judge for his discharge, after giving notice of such petition to the Insolvent, and also to the Inspectors, if any have been appointed, or to the creditors by circular, if no Inspectorshave been appointed; and he shall produce

Obligation of  
assignee.

and file with such petition a bank certificate of the deposit of any dividends remaining unclaimed, and of any balance in his hands; and a statement showing the nominal and estimated value of the assets of the Insolvent, the amount of claims proved, dividing them into ordinary, privileged, or secured and hypothecary claims, the amount of dividends or of composition paid to the creditors of the estate, and the entire expense of winding up the same. And the judge, after causing the account to be audited by the Inspectors, or by some creditor or creditors named by him for the purpose, and after hearing the parties, may grant conditionally or unconditionally, the prayer of such petition, or may refuse it.

**48.** Any Assignee who neglects to present such a petition within six months after the declaration of a final dividend, or within three months after he shall have been required by the Inspectors or by any creditor of the estate, after it shall have been ascertained that there are no assets wherewith to declare a dividend, shall incur a penalty not exceeding one hundred dollars.

(2.) The provisions of the next preceding section shall apply to all persons who have acted or are acting as Assignees under "*The Insolvent Act of 1869*," or in either of the Provinces of Quebec or Ontario under the Act formerly in force therein, called and known as "*The Insolvent Act of 1864*," or any Act or Acts amending or continuing the same or either of them: and any such person, who neglects to present such a petition as there-in mentioned within the following delays respectively, shall incur a penalty of one hundred dollars, that is to say:—

(a) In case a final dividend has been declared before the coming into force of this Act, or in case the Assignee has been unable to realize any assets to be divided, then within three months after this Act has come into force:

(b) In case a final dividend is declared after the coming into force of this Act, then within six months after the declaration of such final dividend.

Final account  
of assignee.

To Power of  
judge.

Penalty in case  
of neglect to  
present such  
petition.

Provisions of  
Sec. 47 to apply  
to assignees  
under former  
acts.

**SEC. 48.**

**Assignee must apply for discharge.**

This section renders compulsory the assignee's application for discharge, a proceeding virtually optional with him under the former Acts, and will probably be found of a satisfactory nature in many estates, which have been in the hands of the assignees for years without having been finally settled.

**COMPOSITION AND DISCHARGE.**

**Meeting to consider composition and discharge, how and when called.**

**49.** If at the first meeting of the creditors, or at any time thereafter, the Insolvent files with the Assignee a consent in writing to his discharge, or a deed of composition and discharge, signed by at least a majority in number of the creditors, who have then respectively proved claims of one hundred dollars and upwards, or if at such first or at any subsequent meeting an offer in writing be made by the Insolvent to compound with his creditors, specifying the terms and conditions of the proposed composition, and such offer be approved of by a majority in number of such creditors present at such meeting, the Assignee shall call another meeting of the creditors to take such consent or such deed or offer of composition and discharge into consideration: and in every case such deed of composition or offer of composition shall be on condition, whether the same be expressed or not, that if the same be carried out, the Insolvent shall pay the costs incurred in Insolvency, including those for the confirmation of such composition.

**Deed to be submitted to meeting.**

This section makes several important changes in the existing law, especially in requiring the deed of composition to be submitted to a meeting of creditors, thus inviting that free and verbal discussion of it which is likely frequently to prove beneficial, and which was so often escaped by the insolvent being able to approach each creditor separately.

**Acceptance of deed in Eng- land.**

By the English Act (1869), the "trustee may with the sanction of a special resolution of the creditors," at a meeting called for the purpose, accept a composition "or assent to any general scheme of settlement, subject to the approval of the court." And a special resolution is defined to be one decided by a majority in number and three-fourths in value of the creditors present at such meeting, and voting on such resolution.

**Mode of reckoning majority.**

In calculating this majority, the claims unaffected by the deed of discharge, and specified in secs. 61, 62, and 63 *post*, will not be reckoned.

Only those whose claims would be involuntarily affected by the discharge, are to be considered.

This deed may be made before, pending, or after assignment; for although not so stated, as in sec. 94 of the act of 1869, this is implied.

It does not appear to us that it can be legally completed until one month from the notice by the assignees to the creditors, to file their claims, as provided in § ante. Because, before it can be prudently acted upon by the assignee, he should be satisfied that it had been executed by the requisite number of creditors, who also represented the necessary proportion in value; and he can usually have no legal means of ascertaining this, until the expiration of this period allowed to the creditors.

Notwithstanding the power thus given to the majority of creditors to bind the non-assenting minority, it has been held, in several cases, that the power must have been exercised *bona fide* for the benefit of all the creditors, or it would not be supported, and it would seem that the same principle applies to resolutions under this section. If, therefore there is a fraudulent bargain for the benefit of some of the creditors, or if the majority of creditors are induced by friendly feelings towards the debtor to accept a composition greatly disproportioned to the assets, the Court would probably hold that a non-assenting creditor should not be prejudiced by the resolution; but on the other hand, if the assenting majority appear to have exercised their discretion *bona fide* for the benefit of the creditors, the Court will not sit in review upon the quantum of the composition; (*ex parte and in re Cowen*, L. R. 2 Ch. 563; *ex parte and in re Roots*, Ib. 559; *ex parte Williams, in re Pullen*, L. R. 10 Ep. 57, 39, L. J. Ba. 1; *Hart v. Smith*, L. R. 4, Q. B. 61).

But where one creditor covenanted with all the other creditors for payment to them of a composition of four shillings in the pound on their debts and all the creditors released the debtor from the original debts subject to a proviso for making the deed void, on default in payment of the composition, and the debtor assigned all his property to the one creditor who entered into the covenant absolutely, it was held, that the deed was not on its face void as giving an undue advantage to the one creditor, (*ex parte and in re Nicholson* L. R. 5 Ch. 332; *Bissell v. Jones*, L. R. 4 Q. B. 49; *Sowry v. Low*, L. R. 3 Q. B. 281). The trustees of a deed of assignment for benefit of creditors made by two partners, contracted with certain of the creditors to deal with both the joint and separate estate of the debtors in such a manner as to pay all the creditors 5s. in the pound; and creditors were induced by the pros-

**SEC. 49.** pect so held out to them to assent to the deed. From the accounts annexed to the deed it appeared that, if this contract were carried into effect, the joint creditors would gain an advantage over the separate creditors of both partners, and the separate creditors of one partner an advantage against those of the other; and it was held that such an arrangement could not be supported. (*in re Evans*, 21 L. T. N. S. 112.)

**Composition by partnership.** Under Act 1861 it was settled that where a person who carried on business in partnership executed a composition deed for the benefit of his separate creditors only, which was assented to by the requisite statutory majority of separate creditors, and the firm was also indebted, the deed was not binding on a dissenting separate creditor, (*ex parte & in re Glen*, L. R. 2Ch. 670; and see *Thompson v. Knight*, 2 L. R. Ex. 42; *Tetley v. Wanless*, 2 L. R. Ex. 21 & 275). So, on the other hand, a deed of composition between the members of a partnership, and the joint creditors of the firm, without any reference to the separate creditors of the different members of the firm, was not within Act 1861, s. 192, but was invalid against non-assenting joint creditors, (*Tomlin v. Dutton*, L. R. 3 Q. B. 466; 9 B. & S. 251). In *ex parte & in re Oldfield*, 3 D. I. & S. 250, 11L. T. (N. S.) 756, it was said that the whole body of the creditors were to deliberate and decide together, and that the separate creditors alone might constitute the majority, (see also *Rixon v. Emery*, L. R. 3 C. P. 546; *European Central Railway v. Westall*, L. R. 1 Q. B., 167; *ex parte Cockburn v. Smith*, 3 D. I. & S. 175; *in re Evans*, 21 L. T. (N. S.), 112 supra; and see G. R. 285).

A composition deed under the English Act of 1861, between an insolvent and his two partners, of the one part, and certain trustees on behalf of the undersigned creditors of the insolvent and his two partners, of the other part, by which all the estate and effects of the insolvent and his two partners were assigned by the insolvent and his two partners for the benefit of the creditors of the insolvent and his two partners, affords no answer on equitable grounds to an action against the insolvent by a creditor for his separate debt, (*European Central Railway Co. v. W. B. Westall*, 1 L. R. Q. B. 167). See, as to effect of composition deeds to bind non-assenting creditors, and as to what are reasonable provisions in such deeds, *Buvelot v. Mills*, 1 L. R. Q. B. 104; *Bond and another v. Weston*, 1 L. R. Q. B. 169; *Gresty v. Gibson*, 1 L. R. Ex. 112; *Reeves and another v. Watts*, 1 L. R. Q. B. 412; *Coles v. Turner*, 1 L. R. C. P. 373; *Brooks v. Jennings*, 1 L. R. C. P. 476; *Blumberg v. Rose*, 1 L. R. Ex. 232; *Greenberg v. Ward*, 1 L. R. C. P. 585; *Jacobson v. Lamert*, 2 L. R., Ex. 394; *McLaren v. Baxter*, 2 L. R. C. P. 559; *Isaacs v. Green*, 2 L. R. Ex.

252; *Bailey v. Bowen*, 3 L. R. Q. B. 133; *Fitzpatrick v. Bourne*, 3 SEC. 49. L. R. Q. B. 233; *Sewry v. Law*, 3 L. R. Q. B. 281). A provision which makes the composition payable on the trustees' certificate, that the deed has been assented to by the statutory number of creditors, is unreasonable, (*Bolnois v. Mann*, 1 L. R. Ex. 28; and see as to what are unreasonable provisions, *Giddings v. Penning*, 1 L. R. Ex. 325; *Latham v. Lafone*, 2 L. R. Ex. 115; *Baker v. Painter*, 2 L. R. C. P. 492; *Oldis v. Armston*, 2 L. R. Ex. 406; *Wigfield v. Nicholson*, 3 L. R. Q. B. 450).

An unreasonable provision in a composition deed will render it invalid against non-assenting creditors, (*Balden v. Pell*, 10 L. T. Rep. (N.S.) 493; and see *Armitage v. Baker*, 10 L. T. Rep. (N.S.) 526; *Hudson v. Barclay*, 10 L. T. Rep. (N.S.) 587; *Woods v. Foote*, 1 H. & C. 841, in error; *Leigh & Pendlebury*, 10 Jur. (N.S.) 296).

A deed which is assented to by the required majority of creditors cannot be unreasonable, unless it gives them some advantage over the minority; (*in re Richmond Hill Hotel Co., ex parte King*, 4 L. R. Eq. 566; affirmed on appeal, 3 L. R. Chy. 10).

An insolvent executed a deed of composition, paying ten shillings in the pound. Some of the creditors declined to assent, but subsequently being informed that the required number had executed, they took the amount of the instalments remitted to them and said nothing. The deed was afterwards decided to be void for want of a strict compliance with the statute, but the dissenting creditors were held to be precluded from suing the insolvent for the balance of their debt; as the mistake, if any, under which they had received the instalments was one of law, and not of fact. (*Kitchen v. Hawkins*, 2 L. R. C. P. 22).

As to a claim against a debtor for unliquidated damages not constituting the holder of the claim of a creditor within the meaning of the unliquidated damages. English Act of 1861 see *ex parte Wilmot*; *in re Thompson*, 2 L. R. Chy. 795; *Hoggarth v. Taylor* 2 L. R. Ex. 105; *Sharland v. Spence*, 2 L. R. C. P. 456; *Robertson v. Goss*, 2 L. R. Ex. 396.

The assent of creditors in writing is all that the English Acts of 1861, Proof of assent. sec. 192, and 1869, s. 28. require; whereas our clause requires the execution of the deed itself by the creditors. In an English case it has been held that the creditors' assent may be given before the deed is executed or even prepared, (*Rutty v. Benthall*, 2 L. R. C. P. 488).

Where a non-assenting creditor sues a debtor, who has executed a composition deed containing a release, for a debt due before the execution of the deed, and the debtor neglects to plead the deed, he is estopped from afterwards setting up the release to defeat the execution, (*Rossi v. Bailey*, 3 L. R. Q. B. 621).

**SEC. 49.**

**Composition  
deeds.**

**Bar to execu-  
tion against  
garnishee.**

**When deed  
may be made.**

A deed of composition under the English Act of 1861, sec. 192, is a bar to an execution issued against a garnishee under an order pursuant to the garnishee clauses of the Common Law Procedure Act, to the same extent that it is a bar to an execution on a judgment, (*Kent v. Tomkinson*, 2 L. R. C. P. 502).

The deed of composition referred to in this clause may be validly made either before, pending, or after proceedings under this Act. Yet the facilities for having it executed by the proper proportion of creditors are very different at these different times. It may be no easy matter for an insolvent always to ascertain the exact number and value of his creditors with sufficient accuracy to satisfy the assignee that the deed has been executed by the requisite proportion. If the period of two months, allowed to creditors to bring in their claims, has elapsed, there will be very little difficulty in telling whether the deed has been properly executed or not.

This section, from analogy to decisions upon the English Act, would seem not to be retrospective so as to bring within its provisions a deed of composition executed before the statute came into operation, as against a creditor who had not executed it, (*Marsh v. Higgins*, 19 L. J. C. P. 297); but it would probably apply to instruments entered into, but inchoate, at the time of the Act coming into force, and since completed, (*Waugh v. Middleton*, 8 Ex. 352; 22 L. J. Ex. 109; *Larpent v. Bibby*, 24 L. J. Q. B. 301). Edgar (1869) p. 111.

**Condition that  
creditor must  
sign to get com-  
position bad.**

A composition deed by which the creditors are entitled to the composition only on signing is bad, (*Martin v. Gribble*, 13 W. R. 691). In determining whether the requisite majority in value of the creditors have assented to a composition deed, the value of the securities held by them is not to be deducted from the debts of the secured creditors, (*Whittaker v. Lowe*, 13 W. R. 723).

**Fraudulent  
consideration.**

By an agreement between a debtor and one of his creditors, the latter agreed to accept, by way of composition, certain notes of the debtor, payable at specified dates; and it was provided that the debtor should also give his note for the whole debt, and that if he were guilty of any default in paying the composition notes, the creditor should rank on his estate for the whole debt. The notes were given accordingly, the debtor made default, and afterwards was proceeded against under the Insolvent Act. It was held that the stipulation as to the whole debt was not illegal, and that there having been default before the insolvency, the creditor was entitled to prove for the whole debt, (*in re McRae*, 15 Grant, 408).

**Validity of  
claims should  
be ascertained.**

Trustees of a composition deed, before they allow a creditor to sign, are bound to ascertain the validity of his claim, as by signing he becomes a *cestui que trust*, and the trustees, except in cases of fraud,

are bound to pay such dividends as may be declared, (*Lancaster v. SEC. 49. Ellice*, 31 L. J. Chy. 789; 8 Jur. (N.S.) 1167).

When a creditor has once given his assent in writing and the bankrupt has acted upon it, and other creditors have given theirs, and presumptively been influenced by each other's action in this respect, and the assent of the requisite number in value and amount is obtained, and filed at the hearing, a creditor thus assenting has no absolute right, even on the day fixed for the hearing, to withdraw or cancel his assent, (*in re Brent*, S. B. R. 444; S. C. 2 Dillon, 129).

It is not necessary that an assignee in insolvency should be a party to a deed of composition and discharge, (Rob. & J. Dig. p. 445). Assignees need not be party.

A deed of composition and discharge under sec. 8. 2 sub. s. 4 of the act of 1864, purporting to be between the insolvents of the first part and a majority of the creditors of \$100 and upwards of the second part, was held invalid, because not executed by the insolvents, (*in re Garrat et al.*, 28. Q. B. 266. Rob. & J. Dig. 446.)

Such a deed to be operative must provide for the separate creditors of each partner, as well as those of the firm. *Ib.* (446).

**50.** Such meeting shall be called by at least one advertisement published in the Official Gazette, stating the time, place, and object of the meeting, and also by a letter or card postpaid addressed by mail, at least ten days before the meeting, to each of the creditors mentioned in the list of creditors furnished by the Insolvent, and to all other creditors who may have proved their claims, although not mentioned in the said list, indicating in substance, in addition to the time, place and object of the meeting, the terms and conditions of the proposed composition and discharge ; and such meeting shall not take place less than fifteen days after the first publication of the said advertisement.

**51.** The creditors present at the meeting to take into consideration the proposed discharge, or composition and discharge, may by resolution to that effect express their approval thereof or dissent therefrom ; and any creditor may at any time before or during the said meeting, file with the Assignee his objections in writing to the proposed discharge or composition and discharge.

**52.** If at the close of the meeting or at any time thereafter the Insolvent has obtained the assent to his discharge or to the proposed composition and discharge,

**SEC. 52.** of a majority in number of his creditors who have proved claims to the amount of one hundred dollars and upwards, and who represent at least three-fourths in value of all the claims of one hundred dollars and upwards which have been proved, the Assignee shall annex to the deed or consent to a discharge, or to the deed or offer of composition and discharge a certificate to that effect, in which he shall state the total number and total amount of claims of one hundred dollars and upwards which have been proved, the number of creditors who have given their written assent to the discharge or to the proposed composition and discharge of the Insolvent, and the amount of proved claims of one hundred dollars and upwards which they represent. The Assignee shall further annex to such certificate a copy of any resolution adopted at the meetings of creditors in reference to the discharge, or to the proposed composition and discharge, and all the objections which may have been filed with him to such discharge or composition and discharge, together with a certificate as to the amount of claims of the creditors who shall have agreed to or opposed such resolution, or who may have filed objections in writing to such discharge or proposed composition and discharge, indicating the amount of such claims of one hundred dollars and upwards which have been proved, and whether from their nature they will be affected by the proposed discharge or composition and discharge.

Probable ratio  
of dividend to  
be stated.

The Assignee shall further state in such certificate the ratio of dividend actually declared and likely to be realized out of the estate for the unsecured creditors, and shall, without delay, transmit such certificate to the clerk or prothonotary of the court in the county or district wherein the proceedings are carried on.

Application for  
confirmation of  
discharge.

**53.** An Insolvent who has procured a consent to his discharge, or the execution of a deed of composition and discharge, and the certificate of the Assignee, within the meaning of this Act, may file in the office of the court the consent or deed of composition and discharge, with such certificate annexed, and may then give notice

[Form J.] of the same being so filed and of his intention SEC. 53.  
 to apply by petition, to the Court in the Provinces of  
 Quebec and Nova Scotia, or in the Provinces of Ontario,<sup>Application for</sup>  
 New Brunswick, Prince Edward Island, British Columbia<sup>confirmation of</sup>  
 and Manitoba, (and in Nova Scotia, when County Judges<sup>discharge.</sup>  
 Notice.  
 are appointed there) to the Judge, on a day named in  
 such notice (which, however, shall not be before the day  
 on which a dividend may be declared under this Act),  
 for a confirmation of the discharge effected thereby ; and  
 such notice shall be given by one advertisement in the  
 Official Gazette and also by letter or card postpaid,  
 addressed to each of the creditors by mail at least one  
 month before presenting the petition to the court or  
 judge ; and upon such application, any creditor of the  
 Insolvent, or the Assignee under the authority of the  
 creditors, may appear and oppose such confirmation.

For grounds of opposition see notes to section 56, *post.*

A general agreement of the defendant's creditors to accept a composition of ten shillings was pleaded:—*Held*, not proved by evidence that the defendant, having become insolvent, had paid to some of his creditors one rate in the pound, and to other creditors another rate, (*Forster v. Beltis et al.*, 5, Q. B., 599. Rob. & J. Dig. 390).

A creditor, although not named in the schedule annexed to the assignment, may oppose the confirmation of discharge, (*in re Stevenson*, 1 L. J. (N. S.) 52 C. C. Logie, (443).

The insolvent should be present when application is made for confirmation, *Ibid.*

### FORM J.

#### INSOLVENT ACT OF 1875.

CANADA	}	In the ( <i>name of Court,</i> )
PROVINCE OF		In the matter of A. B., ( <i>or</i> Form of notice.
District ( <i>or</i> County of)	A. B. & Co.,) an Insolvent.	

The undersigned has filed in the office of this Court, a consent by his creditors to his discharge (*or* a deed of

**Sec. 53.** composition and discharge executed by his creditors), and on the day of next, he will apply to the said Court (or to the Judge of the said Court, *as the case may be*) for a confirmation of the discharge thereby effected.

(Place, date)

(Signature of Insolvent, or of his Attorney ad litem.)

Confirmation of  
discharge.

**54.** If it appears that all the notices and formalities required by law have been given and observed, and that no objections have been made to the proposed discharge or composition and discharge, the court or judge may without further notice, and on the petition of the Insolvent, confirm his discharge or the proposed composition and discharge; but in case it appears that objections have been made to such discharge or composition and discharge, the application of the Insolvent shall not be heard until at least three days' notice shall have been given of the same by the Insolvent to the Assignee, the Inspectors and to the creditors who shall have objected to the said discharge, or proposed composition and discharge.

Affidavit by in.  
solvent to be  
produced.

**55.** The court or judge shall not confirm the discharge or proposed composition and discharge of the Insolvent, unless he shall have produced with his application an affidavit in the Form K, showing that no one of the creditors who have signed the same, has been induced to do so by any preferential payment, promise of payment or advantage whatsoever made, secured or promised to him by or on behalf of the Insolvent, and a certificate from the Assignee that he has delivered a sworn statement of his liabilities and assets as required by this Act.

A note of a third party given by an insolvent to a creditor, to obtain the creditor's consent to a discharge of the insolvent, is null and void, (*Doyle & Prevost et al.*, 17 L. C. Jur. p. 307).

## FORM K.

SEC. 55.

## INSOLVENT ACT OF 1875.

In the matter of A. B.,

<sup>Form of affi-</sup>  
davit.

An Insolvent.

I, A. B., of application to the an Insolvent, now making application to the for a confirmation of my discharge (*or* of my deed of composition and discharge) being duly sworn depose and say:

That no one of my creditors who has signed the said discharge (*or* the said deed of composition and discharge) has been induced so to do by any payment, promise of payment, or advantage whatsoever, made, secured or promised to him by me or, with my knowledge, by any person on my behalf.

And I have signed.

Sworn before me at  
this                    day of                    }

**56.** The Insolvent shall not be entitled to a confirmation of his discharge or of a deed of composition and discharge if it appears to the court or judge that he has not obtained the assent of the proportion of his creditors in number and value required by this Act to grant such discharge or enter into such deed of composition and discharge, or that he has been guilty of any fraud or fraudulent preference within the meaning of this Act, or of fraud or evil practice in procuring the consent of the creditors to the discharge, or their execution of the deed of composition and discharge, as the case may be, or of fraudulent retention and concealment of some portion of his estate or effects, or of evasion, prevarication or false swearing upon examination as to his estate and effects, or that the Insolvent has not kept an account book shewing his receipts and disbursements of cash, and such other books of account as are suitable for his trade, or

<sup>when insolvent  
shall not be enti-  
tled to con-  
firmation of dis-  
charge.</sup>

<sup>Proper books  
must have been  
kept.</sup>

**SEC. 56.** that if, having at any time kept such book or books, he has refused to produce or deliver them to the Assignee, or is wilfully in default to obey any provision of this Act or any order of the court or judge; but in the Provinces of Ontario and Quebec, the omission to keep such books before the coming into force of the Insolvent Act of 1864, and in the Provinces of New Brunswick and Nova Scotia, such omission previous to the coming into force of the Insolvent Act of 1869, and in the Provinces of British Columbia, Prince Edward Island or Manitoba, such omission, previous to the coming into force of this Act, shall not be a sufficient ground for refusing the confirmation of the discharge of an Insolvent :

**Proviso as to  
fraud and fra-  
udulent prefer-  
ences.**

And provided further that any act on the part of the Insolvent, which might be held to be an act of fraud or fraudulent preference within the meaning of the Insolvent Act of 1864 or of 1869, or of this Act, but which would not amount to fraud if the said Acts or this Act had not been passed, shall not be a ground for refusing the confirmation of the discharge of any Insolvent, if such act was done by the Insolvent, in the Province of Ontario or Quebec, before the coming into force of the Insolvent Act of 1864, or in the Province of Nova Scotia or New Brunswick before the coming into force of the Insolvent Act of 1869, or in the Province of British Columbia, Prince Edward Island or Manitoba, before the coming into force of this Act.

The acts enumerated in this section are not in the nature of offences created and defined by the bankrupt law, the penalty for the commission of which by the bankrupt is the forfeiture of his right to a discharge. The Bankrupt Act was intended to operate, and has been uniformly held to operate upon and provide for the discharge of debts created before as well as after its passage, and in respect to debts contracted before its passage, it is clearly a retrospective and retractive law so far as it authorizes the discharge of such prior debts. Prior to the passage of the Act, the debtor had no right to a discharge from such debts, and he now has no right to such discharge except in the cases provided for, and upon the conditions prescribed in the Act. These provisions create no offences, and there is no forfeiture of an existing right denominated as the penalty for a newly created

offence, for the simple and obvious reason that a right to a discharge SEC. 56. in the cases provided for did not exist when the Act was passed, and, therefore, the provisions are not retroactive or retrospective in the proper sense of those terms. The Act gives a debtor a right to a discharge, provided he fully complies with its provisions, and is not brought within the limitations, exceptions, or prohibitory provisions of the Act, and as this right only exists by virtue of the Bankrupt Act, the provisions of this section are only exceptions in restriction or limitation of the grant of power to the bankruptcy court, under which grant alone a debtor can, in any case not excepted from its operations, assert a right to a discharge, (*in re Cretiew*, 5 B. R. 423; S. C. 2 L. T. B. 137). Bumps.

Congress has an undoubted right to annex such conditions as it chooses to the grant of a discharge. Such a condition is not a punishment nor retroactive. It is simply a condition precedent, (*in re Goodfellow*, 3 B. R. 452; S. C. Lowell, 510; S. C. 1 L. T. B. 179; S. C. 3 L. T. B. 69.)

If the formal requirements of the Bankrupt Act have been complied with, a discharge is only to be refused for some grounds set forth in this section. The fact that the debt of the creditor is a fiduciary debt, is no ground for withholding a discharge, (*in re Elliott*, 2 B. R. 110; *in re Tracy et al.*, 2 B. R. 298).

Fraud in the creation of a debt is no ground for withholding a discharge, (*in re Rathbone*, 1 B. R. 324; S. C. 2 Bt. 138; *in re Rosenfield*, 1 B. R. 575; S. C. 1 L. T. B. 100; *in re Wright et al.* 2 B. R. 41; S. C. 15 Pitts. L. J. 553; *in re Bashford*, 2 B. R. 73; *in re Clarke*, 2 B. R. 110; *in re Doody*, 2 B. R. 201; *in re Stokes*, 2 B. R. 212).

The fact that the assignee, by inadvertence or mistake, has set apart to the bankrupt certain property as exempt, which is not exempt by law, and which should be subject to his creditors, is no ground for opposing the discharge. The propriety of the assignee's action in this respect should have been contested at the proper time, and in the proper manner, (*in re Eidom*, 3 B. R. 106).

It was held in the Superior Court, Montreal, that when the consideration given to a creditor to induce him to sign the discharge of insolvent did not injure the estate in the slightest degree, the validity of the deed remained unaffected. (*Thurber & Law, Young & Co.*, 11 L. C. Jur. 46.) This dictum, as that of a respectable tribunal and judge of high attainments, arrests our notice and challenges criticism. Viewed in the light of the changes in the law introduced by the statutes of 1869 and the present one, it can scarcely be any longer considered as a precedent.

**Sec. 56.**

**Grounds for refusing discharge.** So also, if a creditor takes a guaranty for an additional amount to that payable by the deed, and signs the deed, *after* the other creditors had signed, and been paid the composition. (See *Smith v. Saltyman*, 25 English Law & Eq. Rep. 476,) where the English rules on this question are stated by the Judges.

To a plea of discharge under the Canadian Act of 1864, confirmed by the Court, the plaintiff set up in answer, a corrupt agreement between the insolvent and David Torrance & Co., parties to the deed of composition and discharge, that in consideration of executing it, D. T. & Co. should receive an additional sum above the composition, for which the insolvent gave his note, and that the plaintiff and the other creditors had no knowledge of it until after the confirmation ; and that plaintiff never signed the deed of discharge.

*Held*—a good answer : the confirmation not being conclusive by the Act under such circumstance, (*Thompson v. Rutherford*, 27 Q. B. Rep. (Ontario) 205. Pop. p. 142).

**Giving note of third party an illegal consideration.**

A note of a third party given by an insolvent to a creditor to obtain the creditor's consent to a discharge of the insolvent is null and void, (*Doyle and Prévost et al.*, 17 L. C. Jurist, p. 307, & *Prévost et al. and Vickie*, 17 L. C. Jurist, p. 314).

**Certain omissions from schedule not sufficient to stop discharge.**

An insolvent had the possibility of an interest under a will (the construction of which was incidentally considered for the purpose of the appeal) which, however, was omitted from his schedule of assets, as being of no value :—*Held* that this omission was not an act of fraud, (*in re Jones*, 4 P. R. 317; *C. L. Chamb, A. Wilson, Rob. & J. Dig.* p. 440).

When it appears that the bankrupt has innocently omitted certain property from his schedules, the granting of the discharge will be suspended until he shall have properly amended his schedules, (*in re Connell*, 3 B. R. 443).

**Irregular assignment.**

Discharge refused, because assignment not made to the assignee where insolvent carried on business, and was not in duplicate, and insolvent had kept no proper accounts, (*in re Sullivan*, 5 L. J. (N. S.) 71; *C. C. Sherwood, Rob. & J. Dig.* p. 440).

**Trader continuing business in good faith.**

A trader, after discovering that he could not pay in full, continued his business, in the hope, which was not shewn to have been absurd or unreasonable, that he would thereby be able to do so ; and in the course of the business so continued contracted some new debts ; but was unsuccessful, and found it necessary to assign under the Act :—*Held*, that he was not thereby disentitled to his discharge, (*in re Holt et al.*, 13 Chy. 568; *Rob. & J. Dig.* 441.)

In such a case it may or may not be his duty to discontinue his trade, according to circumstances : continuing may be a fraud but is not necessarily so, (*Ib.*, *Rob. & J. Dig.* 441).

The absence of any satisfactory statement how it came that a credit balance of \$15,000 a short time before the insolvency was turned into a debit balance of nearly \$13,000; the loan of \$17,000 by the insolvent to his brother, to carry on a business which failed, and which was carried on without capital, the receipt of \$1,250, by the insolvent a few months before his insolvency without any reasonable account of what had become of it; were considered to be circumstances which shewed that the insolvent was not entitled to his final certificate, (*Hood & Dodds*, 19 Chy. 639; Rob. & J. Dig. 441).

The provisions contained in this section under which creditors may oppose the discharge of an insolvent on the ground of fraud or fraudulent preference are of wide application. This discharge is effectual to wipe out liabilities whenever incurred, and it is only reasonable that the conduct of the insolvent in conjunction with the incurring of these same liabilities should be closely scrutinized upon his application for discharge, although such investigation may carry the enquiry back to an earlier date than 1864. (Edgar, 1869, p. 118.)

Where a trader whose whole property was heavily mortgaged, and who had large overdue debts which he could not pay, obtained credit from Montreal merchants, concealing his true position, falsely alleging that he was worth \$4,000 more than he owed, and that he had no engagements he could not meet, he was held to be guilty of such fraud as disentitled him to his discharge under the Act, although committed before 1864, (*in re Owens*, 12 Grant, 560; and see *in re Staner*, 2 DeG. McN. & G. 263, Rob. & J. Dig. 441).

It would seem that no other grounds than those set out in this clause can be taken in opposition to the confirmation of a discharge obtained by consent of creditors, (*in re Holt and Gray*, 13 Grant 568) Edgar.

The neglect to keep proper books of account is a most serious Neglect to keep breach of duty, causing great possible injury to creditors, and tending proper books. to raise strong distrust of the integrity of the debtor; and Mr. Chief Justice Hagarty says, (*in re Lamb*, 4 Prac. & Chr. Reps. U. C. 16) that "it would be well always to punish such a breach of duty in a severe and exemplary manner."

This is a most important provision, because it is that which is intended to provide the assignee representing the creditors with the means of tracing out all the dealings of the debtor, to ascertain what has become of his property, what are the causes of his failure, and whether he has dealt fairly and equally with his creditors. However harshly the law may sometimes operate with some small traders, whose affairs seem hardly worthy of the trouble of record-

SEC. 56.

Grounds of  
opposition to  
discharge.

Unexplained  
entries in books

Fraud and frau-  
dulent prefer-  
ence.

**SEC. 56.** ing them, it is a most reasonable and salutary rule in its application to merchants dealing with large sums and contracting large debts, Neglect to keep books. and in a position to know and carry out the law, (*in re George & Proctor*, Lowell, 409).

**Intent in not keeping books is immaterial.** The intent of the non-keeping of books is of no importance. The mere omission is the thing plainly interdicted. Such an omission prevents a discharge whether the intent was fraudulent or not, (*in re Solomon*, 2 B. R. 285; s. c. 25 Leg. Int. 364; *in re Newman*, 2 B. R. 202; s. c. 3 Bt. 20; *in re Jorey & Son*, 2 B. R. 668; s. c. 2 Bond, 336; *in re Schumpert*, 8 B. R. 415.)

It is not sufficient that a bankrupt employed a bookkeeper that he considered competent and left the whole charge of the books to him. The law does not require traders to keep a bookkeeper, but to keep books, and they are responsible to see that this is done, (*in re Hammond & Coolidge*, 3 B. R. 273; s. c. Lowell 381).

**No excuse will avail.** No excuse, however true, and no innocence of intention, will avail to supply the deficiency, (*in re George & Proctor*, Lowell, 409).

**How books must be kept.** Whether the books of account are properly kept is a question which must be decided in each case upon the facts as they appear, and not upon any strict rule that such and such books and such entries are essential in all cases, (*in re Perry & Allen*, 20 Pitts. L. J. 184; s. c. 7 W. J. 379).

It is not necessary that these books be kept according to the forms taught in schools, or in ledgers or day books bound in leather. In business of some kinds, any contemporaneous written memorials, formal or informal, of a tradesman's transactions, whether in a bound volume or in detached sheets, may answer the definition of proper books of account, if they have been preserved and so arranged as to present an intelligible and substantially complete exposition of his affairs. The question of what are proper books must be in each case a question of evidence. What would be proper and sufficient books in one case, would be improper and insufficient in another, (*in re Solomon* 2 B. R. 285; s. c. 25 Leg. Int. 364; *in re Newman*, 2 B. R. 302; s. c. 3 Bt. 20; *in re White* 2 B. R. 590; s. c. 2 L. T. B. 105; s. c. 16 Pitts. L. J. 110; *in re Batchelder*, 3 B. R. 150; s. c. Lowell, 373.)

There is no positive rule of law requiring the entries to be made daily (though they ought to be at or near the time of the transaction, or the balance to be made up at any fixed periods, or the books to be kept in any particular mode, (*in re George & Proctor*, Lowell, 409.)

**Loose memos. randa are not books.** Entries upon numerous slips of papers, each entry being on a separate slip, is not a keeping of books under the law. This may do

for a short time in the absence of the books, but not as a system or policy of a permanent character. If the books were lost and there was no reasonable expectation of finding them, or if they were not found within a reasonable time, it was the duty of the bankrupt to supply their place with others, (*in re Hammond & Coolidge*, 3 B. R. 273; s. c. Lowell, 381).

The law requires that a merchant or tradesman should keep such books as, considering the nature and circumstances of his trade, are necessary to exhibit to a person of competent skill the true state of his dealings and affairs, (*in re Hammond & Coolidge*, 3 B. R. 273; s. c. Lowell, 381; *in re Solomon*, 2 B. R. 273; s. c. 25 Leg. Int. 364; *in re Jorey & Son*, 2 B. R. 668; s. c. 2 Bond, 336).

It is a question of fact whether the books are such as will give to a competent person examining them, knowledge of the true state of the bankrupt's affairs. The question is addressed to the good sense and knowledge of the jury, aided by such explanations as may be offered by experts or other competent witnesses, (*in re George & Proctor*, Lowell, 409; *in re Hammond & Coolidge*, 3 B. R. 273; s. c. Lowell, 381; *in re Schumpert*, 8 B. R. 415).

Where the day book and the ledger taken together show all the transactions of the bankrupt, a discharge may be granted, although there are some meaningless mutilations in each, (*in re Wm. H. Pierson*, 10 B. R. 107).

A cash account is necessary to an understanding of a trader's business, and when one has not been kept a discharge will be refused, (*in re Gay* 2 B. R. 358; s. c. 1 L. T. B. 73; *in re Solomon*, 2 B. R. 285; s. c. 25 Leg. Int. 364; *in re Littlefield*, 3 B. R. 57; s. c. Lowell, 331; s. c. 1 L. T. B. 164; *in re Belis et al.*, 3 B. R. 496; s. c. 4 Bt. 53).

The cash book should show, in an intelligible and proper manner, the nature and character of the receipts and disbursements of cash made by the bankrupt, (*in re Mackay et al.*, 4 B. R. 66; s. c. 2 C. L. N. 393).

The omission of an entire book or set of entries, necessary to the understanding of the business, prevents a discharge, (*in re White*, 2 B. R. 590; s. c. 2 L. T. B. 105; s. c. 16 Pitts, L. J. 110).

Careless omissions or mistakes, without fraud, in books themselves proper, may be overlooked, (*in re White*, 2 B. R. 590; s. c. 2 L. T. B. 105; s. c. 16 Pitts, L. J. 110; *in re Burgess*, 3 B. R. 196).

The question is whether the bankrupt did all that a prudent business man, intending to keep his accounts accurately, would naturally

SEC. 66.

Neglect to keep books.

How books must be kept.

Cash account absolutely necessary.

Careless omissions.

**SEC. 56.** do. A temporary omission, in good faith and for a reasonable time, to make the entries, would not be a failure to keep books. But a neglect to keep them on purpose for a reasonable time would be, (*in re Hammond & Coolidge*, 3 B. R. 273; s. c. Lowell, 381.)

**Mutilated books.** Where one of the books has been mutilated, but all the outstanding accounts which it contained have been transferred to another book, a discharge will be granted when the evidence shows that no fraud was done to the creditors by the change, and that the accounts were all collected as far as collectible, (*in re Norman & Conolly*, 3 B. R. 267).

**Books must be intelligible.** Persons who buy on credit, and sell again in such wise as to be merchants or tradesmen, must see to it, in order to be in a position when misfortune overtakes them, to obtain the benefits of the Bankrupt Act, that they keep such books in relation to their business as will furnish an intelligible account to their creditors of the state and course of their business transactions; not leaving such account to be made up from memory or from sources other than such books, (*in re Ed. Garrison*, 7 B. R. 287; S. C. 5 Bt. 430).

A discharge will not be refused to a bankrupt for not keeping proper books of account without full evidence of the facts of their bearing upon his business. The books themselves should be produced, and the parol statements should be definite, (*in re Batchelder*, 3 B. R. 150; s. c. Lowell, 373).

A cancelled check is admissible in evidence in connection with the stump of the check book, to show how the book was kept, (*in re W. E. Brockway*, 7 B. R. 595; Bumps, p. 622).

**Partners cannot obtain discharge if firm did not keep books.** If a firm has not kept proper books of account, a partner cannot obtain a discharge, although he was a junior member and not a keeper of the books, (*in re Wm. H. Puison*, 10 B. R. 107).

When a bankrupt dies before he has taken this oath, a discharge cannot be granted, (*in re O'Farrell et al.*, 2 B. R. 484; S. C. 3 Bt. 181; S. C. 1 L. T. B. 159; *in re Quinike*, 4 B. R. 292; S. C. 2 Biss 354).

The final oath is merely an item of indispensable evidence, without which the bankrupt is not entitled to his discharge, and it is sufficient if it be produced and filed on the hearing, (*in re Robert A. Sutherland, Deady*, 573.)

**Court should ex-mero motu refuse discharge.** It is the duty of the Court to examine the record before granting the discharge, and, if it appears that the bankrupt is not entitled thereto, to refuse it, even though creditors do not interpose objections. When the record of the bankrupt's examination shows that he has, since the passage of the Bankrupt Act, lost money at gambling, the

discharge must be refused, (*in re Wilkinson*, 3 B. R. 286; S. C. 2 SEC. 53. W. J. 350; S. C. 16 Pitts L. J. 237).

No discharge can be granted when notice of the assignee's appointment has not been duly published, (*in re Bellamy*, 1 B. R. 64; S. Non-publication of assignee's appointment. C. 1 Bt. 390; S. C. 1 L. T. B. 22; *in re Strachan*, 3 B. R. 148; contra, *in re Littlefield*, 3 B. R. 57; S. C. Lowell, 331; S. C. J. L. T. B. 164).

The granting of a discharge may be suspended until the assignee shall have filed and settled his accounts. It is a part of the bankrupt's duty to his creditors to see that the assignee's account is exhibited in proper season, (*in re Pierce & Holbrook*, 3 B. R. 258; S. C. 16 P. L. J. 204).

When an order for the bankrupt's wife to attend for examination has been served upon the bankrupt, though not served upon her, and she has failed to attend at the time and place specified, the bankrupt is not entitled to a discharge, unless he proves to the satisfaction of the Court that he was unable to procure her attendance, (*in re Van Tuyl*, 2 B. R. 579; S. C. 3 Bt. 237).

**57.** The court or judge, as the case may be, upon hearing the application for confirmation of such discharge, the objections thereto, and any evidence adduced, shall have power to make an order either confirming the discharge or annulling the same according to the effect of the evidence so adduced.—But if such evidence should be insufficient to sustain any of the grounds hereinbefore detailed as forming valid grounds for contesting such confirmation, but should nevertheless establish that the insolvent has been guilty of misconduct in the management of his business, by extravagance in his expenses, recklessness in endorsing or becoming surety for others, continuing his trade unduly after he believed himself to be insolvent, incurring debts without a reasonable expectation of paying them (of which reasonable expectation the proof shall lie on him, if such debt was contracted within thirty days of the demand made of an assignment or for the issue of a writ of attachment), or negligence in keeping his books and accounts ; or if such facts be alleged by any contestation praying for the suspension of the discharge of the Insolvent, or for its classification as second class, the court or judge may thereupon order the suspension of the operation of the discharge of the Insolvent for a period not exceeding five years, or may declare the dis-

Grounds of opposition to discharge.

Assignee's accounts to be filed.

In certain cases character of discharge may be modified.

May be suspended or made second-class.

**SEC. 57.** charge to be of the second class, or both, according to the discretion of the court or judge.

**Insolvent may refer to previous examination.**

On an application for discharge, the insolvent is entitled to read his own examination, though taken at the instance of a friendly creditor; and the only question is, as to the weight to be attached to it, (*in re Holt & Gray*, 13 Chy. 568; Rob. & J. Dig. 448.)

**Right to discharge from arrest no criterion.**

An insolvent may be entitled to his discharge from arrest, though his conduct in trade may have been such as to disentitle him to a certificate of discharge from his debts. Rob. & J. Dig., 448. See *in re McRae*, 15 Chy. 408, p. 426. *Dickinson v. Burnell*, 19 C. P. 216, p. 429.

**Discharge may be conditional.**

An order of discharge may be granted subject to any condition touching any salary, pay, emoluments, profits, wages, earnings, or income which may afterwards become due to the bankrupt, and touching after acquired property of the bankrupt, (*in re Anderson*, 6 L. T. Rep. (N.S.) 837, Bank.; *in re Inman*, 6 L. T. Rep. (N.S.) 665, Bank. It seems that it is not in the discretionary power of the Court to refuse or suspend the order of discharge, when the bankrupt has not been guilty of conduct amounting to a fraud under this Act (see *ex parte Udall in re Mew*, 6 L. T. Rep. (N.S.) 732, Ch. on appeal; *ex parte Glass & Elliott, in re Boswall*, 6 L. T. Rep. (N.S.) 497).

**Trader continuing business after insolvency.**

Where a person in business finds himself unable to pay 20s. in the pound it may or may not be his duty to discontinue his trade, according to circumstances; continuing his business may be a fraud, but is not necessarily so. A trader, after discovering that he was not in a position to pay 20s. in the pound, continued his business in the hope, which was not shown to have been absurd or unreasonable, that he would thereby be able to pay all his debts in full and meet all his engagements—and in the course of business so continued, contracted some new debts—but was unsuccessful, and after a time found it necessary to make an assignment under this Act. These circumstances were not sufficient to disentitle him to his discharge, (*in re Holt & Gray*, 13 Grant, 568).

As to effect of continuing business after knowledge of insolvency, and of fraudulent preferences, (see *ex parte Thurber & Law*, 11 L. C. J., p. 45; *ex parte Freer & Gilmour*, 12 L. C. J., 315) on same points, and as to fraudulent retention of assets v. *ex parte Tempest & Duchesnay*, 11 L. C. J. 57. On reckless trading v. *ex parte Tessier & Martin*, a. c. Montreal, Oct., 1869.

**58.** Whenever it appears that the estate of the Insolvent has not paid or is not likely to realize for the creditors a dividend of thirty-three cents in the dollar on the unsecured claims, and sufficient account is not given for the deficiency, the court or judge may, in its discretion, suspend or refuse altogether the discharge of the Insolvent.

The word "assets" does not mean money actually realized. Definition of So restricted a construction should not be placed upon it. When the bankrupt has acted in good faith, and performed his duty under the bankrupt law, he is entitled to a discharge if, at the time he filed his petition, he was possessed of property fairly worth thirty per cent. of the debts proved against his estate upon which he was liable as principal debtor. He ought not to be made the victim of circumstances over which he has no control, (*in re Lincoln & Cherry*, 7 B. R. 334; S. C. 2 L. T. B. 241; S. C. 20 Pitts L. J. 1.)

This provision does not admit of a fictitious or exaggerated valuation of his assets by the bankrupt, in his schedule or inventory, while on the contrary, if the assets are at a fair and just estimate and valuation, equal to thirty per cent. of the debts proved, the bankrupt is not to be denied his discharge by reason of any sacrifice made by the assignee or creditors to convert the assets into cash, or because of the absorption of so large a proportion of the proceeds by expenses as to prevent the payment of thirty cents on the dollar, (*in re Thompson*, 2 Biss 481.)

In the absence of proof to the contrary, the proceeds in the hands of the assignee will be taken to be the true value of the estate, (*in re Bonden & Geary*, 5 B. R. 128; S. C. 5 Bt. 228.)

Bumps. 632.

The English Statute requires payment of a dividend of 10s. in the £, or a special resolution of the creditors "to the effect that his bankruptcy or the failure to pay ten shillings in the pound has in their opinion arisen from circumstances for which the bankrupt cannot justly be held responsible."

It is probable that the adoption by the courts here of a rule requiring something of a similar nature before granting a discharge where the estate pays less than the amount mentioned in this section will be found beneficial. The bankrupt in England is required to pay the expense of summoning the meeting to consider his discharge. G. R. 142.

If divided is less than thirty-three per cent. discharge may be refused or suspended.

- SEC. 59.** **59.** A deed of composition and discharge may be made under this Act either in consideration of a composition payable in cash, or on terms of credit, or partially for cash and partially on credit; and the payment of such composition may be secured or not according to the pleasure of the creditors signing it; and the discharge therein contained may be absolute, or may be conditional upon the condition of the composition being satisfied; but if such discharge be conditional upon the composition being paid, and the deed of composition and discharge therein contained should cease to have effect, the Assignee shall immediately resume possession of the estate and effects of the Insolvent in the state and condition in which they shall then be; provided always, that the title of any *bond fide* purchaser of any of the assets of the estate shall not be impaired or affected by this section: but the creditors holding claims which were proveable before the execution of such deed, shall not rank, vote or be computed as creditors concurrently with those who have acquired claims subsequent to the execution thereof, for any greater sum than the balance of composition remaining unpaid: but after such subsequent creditors have received dividends to the amount of their claims, then such original creditors shall have the right to rank for the entire balance of their original claims then remaining unpaid, and shall be held for all purposes for which the proportion of creditors in value require to be ascertained, to be creditors for the full amount of such last mentioned balance.
- 60.** So soon as a deed of composition and discharge shall have been executed as aforesaid, it shall be the duty of the Assignee to re-convey the estate to the Insolvent; and the re-conveyance by the Assignee to the Insolvent or to any person for him, or whom he may appoint, of any part of his estate or effects, whether real or personal, if made in conformity with the terms of a valid deed of composition and discharge, shall have the same effect (except as the same may be otherwise agreed by the conditions of such deed or re-conveyance) as if such prop-

**Deed of reconveyance by assignee to insolvent.**

**Its effect.**

**If condition be not fulfilled.**

**Rank or creditors thereafter.**

erty had been sold by the Assignee in the ordinary course, SEC. 60. and after all the preliminary proceedings, notices and formalities herein required for such sale ; and if such deed of composition and discharge be contested, and pending such contestation, the judge may suspend any payment or instalment of the composition falling due under the terms of such deed ; and the deed of re-conveyance need not contain any further or more special description of the effects and property re-conveyed than is required to be inserted in the deed of assignment, and may be enregistered in like manner and with like effect ; and such deed may be executed before witnesses or before notaries, according to the exigency of the law of the place where such deed of composition and discharge is to be executed.

**61.** The confirmation of the discharge of a debtor in the manner herein provided shall absolutely free and discharge him, after an assignment, or after his estate has been put in compulsory liquidation, by the issue of a writ of attachment, from all liabilities whatsoever (except such as are hereinafter specially excepted) existing against him and proveable against his estate, whether the same be secured in part or in whole by any mortgage, hypothec, lien or collateral security of any kind or not, which are mentioned or set forth in the statement of his affairs exhibited at the first meeting of his creditors, or which are shewn by any supplementary list of creditors furnished by the Insolvent, previous to such discharge and in time to admit of the creditors therein mentioned obtaining the same dividend as other creditors upon his estate, or which appear by any claim subsequently furnished to the Assignee ; whether such debts be exigible or not at the time of his insolvency, or be contested in whole or in part, or be dependent on certain conditions or future contingency, and whether the liability for them be direct or indirect ; and if the holder of any negotiable paper is unknown to the Insolvent, the insertion of the particulars of such paper in such statement of affairs or supplementary list, with the declar-

If deed of composition be contested.

Form of deed.

Effect of confirmation of discharge, what claims affected.

Holders of negotiable paper unknown to insolvent.

**SEC. 61.** action that the holder thereof is unknown to him, shall bring the debt represented by such paper, and the holder thereof, within the operation of this section.

**Debts not mentioned in schedule.**

A discharge under the Insolvent Act does not prevent a party from being committed upon a judgment summons under the Division Courts Act. If it did, a party applying for protection from arrest should show clearly that the name of the plaintiff was in his schedule, and this is not sufficiently done by putting in a copy of the schedule without swearing that the plaintiff's name is there, (*In re Mackay et al. v. Goodson*, 27 Q. B. 263, Rob. & J. Dig. 441).

**Claim must be mentioned in schedule.**

To an action for Attorney's costs defendant pleaded his discharge under the Act of 1864, alleging that the plaintiff's name and residence, with a statement of defendant's indebtedness to him being for a balance of costs, and two suits specified, were stated in his schedule filed, and that he was not aware before obtaining his discharge of the exact amount of such indebtedness. The plaintiff replied that his name was not mentioned in the schedule for any sum or amount whatever:—Held on demurrer, that the debt due to the plaintiff was under the circumstances, sufficiently stated in the schedule, (*Cameron v. Holland*, 29 Q. B. 506, Rob. & J. Dig. 442).

**Discharge does not apply to debts subsequent to assignment.**

Although all the property which an insolvent becomes entitled to up to the time of his discharge passes to the assignee, the insolvent is not discharged under the act from any debts incurred after the assignment or issue of the writ.

The bankrupt is in no manner or degree reinvested by the discharge with control over the estate which he surrendered in bankruptcy, (*in re Geo. W. Anderson*, 9 B. R. 360.)

**Discharge not a bar to subsequent promise to pay.**

An antecedent debt, in respect of which an insolvent has duly received his discharge under the Insolvent Acts of 1864 and 1869, is a continuing debt in conscience, and a sufficient consideration for a new promise to pay it. (*Austin v. Gordon*, 32 Q. B. 621, Rob. & J. Dig. 448).

**Execution may be set aside on discharge.**

The court set aside, with costs, a *f. i. fa.* against lands issued on 7th June, 1865, and renewed from time to time until 4th June, 1867, in a case where defendant obtained his discharge on 30th March, 1867. Plaintiff had proved his claim for the full amount of the judgment in the Insolvent Court, and had never attempted to take any proceedings under the writ, which he refused to withdraw, although requested to do so, (*Dickinson v. Bunnell*, 19 C. P. U. C. 216).

But a confirmation of discharge under this paragraph is not "final and conclusive" when obtained by fraud or fraudulent preference, or by the means of the consent of any creditor procured by payment of any valuable consideration for such consent, (*Thompson*

v. *Rutherford*, 27 Q. B. U. C. 205.) These circumstances constitute SEC. 61.  
a good reply to a plea of discharge and confirmation thereof.

Held on exception to the plea set out in the report, that a deed of composition and discharge, made without any proceedings in insolvency (before or after) without any assignee being appointed, and apparently wholly outside the insolvent court, cannot be a bar to non-assenting creditors, (*Green v. Swan*, 22 C. P. 307; Rob. & J. Dig. 446.

Where an insolvent before the meeting of his creditors concealed a portion of his stock :—Held (under the Insolvent Act of 1864) that his discharge was thereby avoided, and that it was not the less a fraud because he had valued his assets at a sum sufficient to cover the goods so concealed. The plaintiff, therefore, though he had signed a deed of composition and discharge, and the discharge had been confirmed, was held entitled to recover for his debt, *McLean v. McLellan*, 29 Q. B. 548.) See *Foster v. Taylor*, 31 Q. B. 24, p. 454; Rob. & J. Dig., (443.)

An insolvent having compounded with his creditors, and had his goods restored to him, resumed business, with the knowledge of his assignees and creditors, and contracted new debts. It was subsequently discovered that he had been guilty of a fraud which avoided his discharge, whereupon he absconded, and an attachment, under the Insolvent Act of 1869, was sued out against him by his subsequent creditors :—Held, that they were entitled to be paid out of his assets in priority to the former creditors, (*Buchanan v. Smith*, 17 Chy. 208, affirmed on rehearing 18 Chy. 41, Rob. & J. Dig. 447).

In such a case the assignee, as representing the former creditors, was ordered to pay the costs of a suit brought by the subsequent creditors to enforce their rights. S. C. 18 Chy. 41, Rob. & J. Dig. 447.

The defendant having been arrested under a Ca. Sa. in April, 1873, applied for a discharge from custody on the ground that when the order was made, and for a long time previous, he was an insolvent under the Act of 1869. It appeared that being sued by the plaintiff, who was his only creditor, the defendant, in September, 1873, made a voluntary assignment under the Act to an official assignee, having then no assets and no expectation of any; and that he had since acquired none; and his own statement was that he was driven to take advantage of the Act on account of the plaintiff's alleged claim, which he had no means of paying :—Semblé, that he could not in this way become entitled to his discharge under the Act; and that the assignment, under the evidence more fully set out in the case, must be regarded as a fraudulent device to defeat the plaintiff, by means of the abuse of the provisions of the Act, (*Thomas v. Hall*, 6 P. R. C. L. Chamb, Gwynn, not yet reported. Rob. & J. Dig. 409).

**EC. 62.** **62.** A discharge under this Act, whether consented to by any creditor or not, shall not operate any change in the liability of any person secondarily liable to such creditor for the debts of the Insolvent, either as drawer or endorser of negotiable paper, or as guarantor, surety or otherwise, nor of any partner or other person liable jointly or severally with the Insolvent to such creditor for any debt; nor shall it affect any mortgage, hypothec, lien or collateral security held by any creditor as security for any debt thereby discharged, without the consent of such creditor.

See notes to sec. 39 *ante*.

A creditor, who, while accepting a composition by which the insolvent agree to pay ten shillings in the £, reserves his recourse against endorsers of notes which he holds, and upon other securities, is not bound to deduct the sums he obtains from such endorsers from his dividend of ten shillings in the £, but only from the total amount of his claim, and the insolvent's sureties, when sued for the dividend they have guaranteed, cannot maintain that the sums so received by the creditor exceed the amount of the stipulated dividend, if he gives credit for those sums on his whole demand, and thus reduces the amount payable as dividend, (*Joseph v. Lemieux et al.*, C. R. 17 L. C. R., p. 170, 1866.)

Where a claimant in insolvency has received from an endorser of a note a composition on the amount of his claim, in consideration of which the claimant has released the endorser, reserving his recourse against all the other parties to the note, whatever the claimant has received from the endorser must be deducted from his claim against the estate of the maker of the note, (*Bessette et al. et La Banque du Peuple et Quevillion*, S. C., 14 L. C. J., p. 21, 1869.)

*Discharge under this act not to apply to certain debts or liabilities.*

**63.** A discharge under this Act shall not apply, without the express consent of the creditor, to any debt for enforcing the payment of which the imprisonment of the debtor is permitted by this Act, nor to any debt due as damages for assault or wilful injury to the person, seduction, libel, slander or malicious arrest, nor for the maintenance of a parent, wife or child, or as a penalty for any offence of which the Insolvent has been convicted; nor shall any such discharge apply without such consent to any debt due as a balance of account due by

the Insolvent as Assignee, tutor, curator, trustee, executor SEC. 63. or administrator under a will, or under any order of court, or as a public officer; nor shall debts to which a discharge under this Act does not apply, nor any privileged debts, nor the creditors thereof, be computed in ascertaining whether a sufficient proportion of the creditors of the Insolvent have voted upon, done, or consented to any act, matter or thing under this Act; but the creditor of any such debt may claim and accept a dividend thereon from the estate without being by reason thereof in any respect affected by any discharge obtained by the Insolvent.

But creditor  
may accept a  
dividend.

**64.** If, after the expiration of one year from the date of an assignment made under this Act, or from the date of the issue of a writ of attachment thereunder, as the case may be, the Insolvent has not obtained from the required proportion of his creditors a consent to his discharge, or the execution of a deed of composition and discharge, he may apply by petition to the court or judge, to grant him his discharge, first giving notice of such application, (Form L,) for one month in the Official Gazette, and also by letter or card postpaid, addressed, Form. ten days before such application, by mail to each of his creditors whose claims amount to one hundred dollars or more, and may be affected by a discharge under this Act.

#### FORM L.

##### INSOLVENT ACT OF 1875.

CANADA, PROVINCE OF _____, District (or County) of _____	} In the matter of A. B., (or A. B. & Co.,) an Insolvent.	In the (name of Court) Form of notice.
On the _____ day of _____ next, the undersigned will apply to the said Court (or the Judge of the said Court, as the case may be,) for a dis- charge under the said Act.		

(Place                      date.)

(Signature of the Insolvent, or of his Attorney ad litem.)

**SEC. 65.** **65.** Upon such application, any creditor of the Proceedings on Insolvent, or the Assignee by authority of the creditors such applica- such application; and pow- or of the Inspectors, may appear and oppose the granting ers of the court or judge. of such discharge upon any ground upou which the confirmation of a discharge may be opposed under this Act,

or may claim the suspension or classification of the discharge or both ; and whether such application be contested or not, it shall be incumbent upon the Insolvent to prove that he has in all respects conformed himself to the provisions of this Act ; and he shall submit himself to any order which the court or judge may make, upon or without an application to that effect, to the end that he be examined touching his estate and effects and his conduct and management of his affairs and business generally, and touching each and every detail and particular thereof ; and the court or judge may also require from the Assignee a report in writing upon the conduct of the Insolvent and the state of his books and affairs before and at the date of his insolvency ; and thereupon the court or judge, as the case may be, after hearing the Insolvent and the opposant, if any, and any evidence that may be adduced, may make an order either granting the discharge of the Insolvent or refusing it ; or in like manner and under the like circumstances to those in and Suspension, or classification as upon which the discharge could be suspended or classified as hereinbefore provided, upon an application to confirm it, an order may be made suspending it for a like period, or declaring it to be of the second class, or both.

Suspension, or classification as  
second class.

Discharge, &c.  
obtained by  
fraud to be  
void.

**66.** Every discharge or confirmation of any discharge obtained by fraud or fraudulent preference, or by means of the consent of any creditor procured by the payment or promise of payment to such creditor of any valuable consideration for such consent, or by any fraudulent contrivance or practice whatever tending to defeat the true intent and meaning of the provisions of this Act in that behalf, shall be null and void ; and in no case shall a discharge have any effect unless and until it is confirmed by the Court.

An assignee who sold outstanding debts due to the insolvent under the 44th section of the Act, according to a Schedule ex-

hibiting the *original amounts* of such debts, *without deduction of SEC. 66. payments received by the assignee on account*, was bound to account for and pay over to the purchaser of such debts the *full amount of such payments* so made to the assignee, notwithstanding that the conditions of sale declared:—"That the sale is made without any "guarantee whatever or any warranty of any kind or description "whatever, so much so that no warranty is given that the debts have "even existence,"—and notwithstanding also, that the audience were informed by the auctioneer, that *dividends had been paid*, and that the amounts in the schedule were the *original amounts without deduction of such dividends*, and notwithstanding, further, that the total amount paid for such debts was *only a few dollars*, and the *payments* in question amounted to more than 600 dollars. (*Lafond et al.*, appellants, and *Rankin*, respondent, Q. B. 18 L. C. J., p. 62.)

#### SALE OF DEBTS.

**67.** After having acted with due diligence in the collection of the debts, if the Assignee finds there remain debts due, the attempt to collect which would be more <sup>Sale of debts  
the collection of  
which would be  
too onerous.</sup> onerous than beneficial to the estate, he shall report the same to the creditors or inspectors, and with their sanction he may sell the same by public auction, after such advertisement thereof as they may order; and pending such advertisement, the Assignee shall keep a list of the debts to be sold, open to inspection at his office, and shall also give free access to all documents and vouchers explanatory of such debts; but all debts amounting to <sup>Proviso.</sup> more than one hundred dollars shall be sold separately, except as herein otherwise provided.

**68.** If at any time any creditor of the Insolvent de- <sup>Creditor may  
be authorized  
to take any spe-  
cial proceeding  
at his own risk.</sup>sires to cause any proceeding to be taken which in his opinion would be for the benefit of the estate, and the Assignee, under the authority of the creditors or of the Inspectors, refuses or neglects to take such proceeding after being duly required so to do, such creditor shall have the right to obtain an order of the judge authorizing him to take such proceeding in the name of the Assignee, but at his own expense and risk, upon such terms and conditions as to indemnity to the Assignee as the judge may pre-

**SEC. 68.** scribe ; and thereupon any benefit derived from such proceeding shall belong exclusively to the creditor instituting the same for his benefit and that of any other creditor who may have joined him in causing the institution of such proceeding. But if, before such order is granted, the Assignee shall signify to the judge his readiness to institute such proceeding for the benefit of the creditors, the order shall be made prescribing the time within which he shall do so, and in that case the advantage derived from such proceeding shall appertain to the estate.

**Proviso.**

The County Judge has a general jurisdiction in matters of insolvency, and may sanction a suit in the name of the assignee for the benefit of the estate, notwithstanding a majority, both in number and value, of the creditors pass a resolution forbidding further proceedings, (*in re Lambe*, 13 Chy. 391; Rob & J. Dig. 450.)

The assignee appealed from such an order in the interest of the creditors whose transactions the suit, impeached for fraud, and the appeal was dismissed with costs: the court observing that it was not his duty to appeal from such an order at the expense of the estate. *Ib.*

**Rights of purchasers of debts due insolvent.**

**No warranty.**

**69.** The person who purchases a debt from the Assignee may sue for it in his own name, as effectually as the Insolvent might have done, and as the Assignee is hereby authorized to do; and a bill of sale (Form M), signed and delivered to him by the Assignee, shall be *prima facie* evidence of such purchase, without proof of the handwriting of the Assignee, and the debt sold shall in the Province of Quebec vest in the purchaser without signification to the debtor; and no warranty, except as to the good faith of the Assignee, shall be created by such sale and conveyance, not even that the debt is due.

## FORM M.

### INSOLVENT ACT OF 1875.

In the matter of

A. B.

an Insolvent.

In consideration of the sum of \$ whereof quit;  
C. D., Assignee of the Insolvent, in that capacity

hereby sells and assigns to E. F. accepting thereof, all SEC. 69.  
 claim by the Insolvent against G. H. of (*describing the Debtor*) with the evidences of debt and securities thereto appertaining, but without any warranty of any kind or nature whatsoever.

C. D., Assignee.  
 E. F.

LEASES.

**70.** If the Insolvent holds under a lease, property having a value above and beyond the amount of any rent payable under such lease, the Assignee shall make a report thereon to the judge, containing his estimate of the value to the estate of the leased property in excess of the rent; and thereupon the judge may order the rights of the Insolvent in such leased premises to be sold separately, or to be included in the sale of the whole or part of the estate of the Insolvent, after such notice of such sale as he shall see fit to order: and at the time and place appointed such lease shall be sold upon such conditions, as to the giving of security to the lessor, as the judge may order; and such sale shall be so made subject to the payment of the rent, to all the covenants and conditions contained in the lease, and to all legal obligations resulting from the lease; and all such covenants, conditions and obligations shall be binding upon the lessor and upon the purchaser, as if he had been himself lessee and a party with the lessor to the lease.

A covenant on the part of a lessee not to assign, &c., will not extend to an assignment by act of law. So that if the lessee become bankrupt, and the term pass to the assignees, it is not an assignment within the meaning of a covenant not to assign, (*Goring v. Warner*, 7 Vin. Abr. 85, pl. 9); and his assignee may afterwards assign it without license, (*Doe v. Smith*, 5 Taunt. 795; *Doe v. Beavan*, 3 M. & S. 353.)

**71.** If the Insolvent holds under a lease extending beyond the year current under its terms at the time of his insolvency, property which is not subject to the provisions of the last preceding section, or respecting which

**SEC. 71.** the judge does not make an order of sale, as therein provided or which is not sold under such order, the creditors shall decide at any meeting, which may be held more than three months before the termination of the yearly term of the lease, current at the time of such meeting, whether the property so leased should be retained for the use of the estate, only up to the end of the then current yearly term ; or, if the conditions of the lease permit of further extension, also up to the end of the next following yearly term thereof, and their decision shall be final.

**72.** From and after the time fixed for the retention of the leased property for the use of the estate, the lease shall be cancelled and shall from thenceforth be inoperative and null ; and so soon as the resolution of the creditors as to such retention has been passed, such resolution shall be notified to the lessor, and if he contends that he will sustain any damage by the termination of the lease under such decision, he may make a claim for such damage, specifying the amount thereof under oath, in the same manner as in ordinary claims upon the estate ; and such claim may be contested in the same manner, and after similar investigation and with the same right of appeal, as is herein provided for in case of claims or dividends objected to.

The privilege of the lessor on the proceeds of the effects found on the premises leased is not affected by the Insolvent Act of 1864, and has precedence over the privilege of the assignee and insolvent for costs of their respective discharges under the Act. *Morgan et Biron*, C. C. 13 ; L. C. J. p. 187, (1869.)

**73.** In making such claim, and in any adjudication thereupon, the measure of damages shall be the difference between the value of the premises leased when the lease terminates under the resolution of the creditors, and the rent which the Insolvent had agreed by the lease to pay during its continuance ; and the chance of leasing or not leasing the premises again, for a like rent, shall not enter into the computation of such damages ; and if the claim is not contested, or if, being contested, the damages are finally awarded to the lessor he shall rank for the amount upon the estate as an ordinary creditor.

How damages  
to be estimated.

**74.** The preferential lien of the landlord for rent in SEC. 74. the Provinces of Ontario, New Brunswick, Nova Scotia, British Columbia, Prince Edward Island, or Manitoba, is restricted to the arrears of rent due during the period of one year last previous to the execution of a deed of assignment, or the issue of a writ of attachment under this Act, as the case may be, and from thence so long as the Assignee shall retain the premises leased. In the Province of Quebec the preferential lien or privilege of the lessor shall be governed by the provisions of the Civil Code.

V. note to § 72.

In France it has been held that the lessor is privileged for all rent due and to become due on effects in premises. *Gazette des Tribunaux* du 20 et 21 Juin, 1870. 2 Rev. Leg., p. 121.

The preferential lien of the landlord in Ontario consisted in the power of distraining upon any goods of the insolvent, so long as they remained upon the leased premises, for arrears of rent. Until the introduction of this clause into the amending Act of 1865 (sec. 14), the landlord was entitled to distrain for six years' arrears, and a troublesome preference was destroyed by this limit of the right of distress to one year's arrears of rent.

As to the privilege in Quebec, see arts. 1619 *et seq.* and 2250 of the Civil Code of that Province.

#### SALE OF REAL ESTATE.

**75.** The Assignee may sell the real estate of the Insolvent, but only after advertisement thereof for a period of two months, and in the same manner as is required for the actual advertisement of sales of real estate by the sheriff in the district or place where such real estate is situate, and to such further extent as the Assignee deems expedient; provided that the period of advertisement may be shortened to not less than one month by the creditors with the approbation of the judge, but in the Province of Quebec such abridgment shall not take place without the consent of the hypothecary creditors upon such real estate, if any there be; and if the price offered for any real estate at any public sale duly advertised as aforesaid is more than ten per cent. less than the value set upon it

Sale of real estate of Insolvent.

In Quebec.

**SEC. 75.** by a resolution of the creditors, or by the Inspectors and the Assignee, the sale may be adjourned for a period not exceeding one month, when, after such notice as the Inspectors and the Assignee may deem proper to give, the sale shall be continued, commencing at the last bid offered on the previous day when the property was put up at auction, and if no higher bid be then offered, the property shall be adjudged to the person who made such last bid : Provided that with the consent of the hypothecary and privileged creditors, or where there are no hypothecary or privileged creditors, with the approbation of the creditors or of the Inspectors, the Assignee may postpone the sale to such time as may be deemed most advantageous for the estate, and whenever the sale shall have been so postponed beyond one month, the last bidder shall be discharged from any obligation under the bid he may have made on the previous day when the property was offered for sale by auction.

**Proviso: postponement of sale by consent of creditors, &c.**

When an assignee improperly refuses a bid for real property offered by him for sale under the Act, and adjudges the property to the previous bidder, the judge will set aside the adjudication, and order the property to be adjudged to the party whose bid was rejected, (*in re Leger dit Parisien, and Stewart*, assignee, and Reither, 17 L. C. Jurist, p. 84.)

Advertisements by assignees in insolvency for the sale of property of the insolvent should describe the property and state the title with the distinctness required in equity in the case of advertisements by trustees and other officials, (*O'Rielly v. Rose*, 18 Chy. 33; Rob. & J. Dig. 420.)

The place of sale is left to the judgment of the assignee and inspectors.

The time and manner of advertising the sales of real estate by the sheriff in Ontario are pointed out in the Common Law Procedure Act (Con. Stats. U. C., ch. 22, s. 267), which enacts as follows :—

“ Before the sale of real estate upon execution against lands and tenements, the sheriff shall publish an advertisement of sale in the *Canada Gazette*, at least six times, specifying,—

“ First : The particular property to be sold ;

“ Second : The names of the plaintiff and defendant ;

“ Third : The time and place of the intended sale ; and he shall for three months next preceding the sale also publish such advertise-

ment in a public newspaper of the county in which the land lies, or shall for three months put up and continue a notice of such sale in the office of the Clerk of the Peace, or on the door of the Court House, or place in which the Court of General Quarter Sessions for such county is usually holden; but nothing herein contained shall be taken to prevent an adjournment of the sale to a future day." SEC. 75.  
Sale of real estate.

By Stats. Ontario, 31 Vic. cap. 6, this notice will be in the *Ontario Gazette*.

In Quebec, it must be advertised in the *Official Gazette*, and, in addition, announced at the church door of the parish where the land lies. See Code of Civ. Pro., art. 648. The assignee may, however, advertise to such further extent—through local papers and placards, &c.—as may appear expedient to him.

If the creditors fail to give directions as to the sale, the inspectors may do so. See secs. 35 and 36 *ante*. This should be done in writing, and the consent of the hypothecary creditors should be obtained in the same manner.

The provisions for the withdrawal and re-offer of the property differ somewhat from those on the same subject in the Act of 1869.

The offers of the property should in each case be at auction, and in this the present act is different from that of 1869.

It would seem from the concluding sentence as though a bid would be binding on the bidder from one month after the sale even though the property should be withdrawn, and subject him to all the consequences, including in the province of Quebec that of "false bidding" (*folle en chère*). This seems needlessly severe, and would rather have a tendency to check than encourage free bidding, as in the event of a withdrawal of the property the last bidder will be obliged for a whole month to hold himself in readiness to take the property, and thus perhaps be put to considerable financial embarrassment and even loss.

**76.** All sales of real estate so made by the Assignee shall vest in the purchasers all the legal and equitable estate of the Insolvent therein, and the conveyance may be in the form N ; but in the Province of Quebec, such sale shall in all respects have the same effect as to mortgages, hypothecs or privileges then existing thereon, as if the same had been made by a sheriff under a writ of execution issued in the ordinary course, but shall have no other, greater or less effect than such sheriff's sale : and in the Province of Quebec the title conveyed by

**SEC. 76.** such sale shall have equal validity with a title created by a sheriff's sale: and the deed of such sale which the Assignee executes (Form N,) shall, in the Province of Quebec, have the same effect as a sheriff's deed; but the Assignee may grant such terms of credit as he may deem expedient, and as may be approved of by the creditors, or by the Inspectors, for any part of the purchase money; except that no credit shall be given in the Province of Quebec for any part of the purchase money coming to any hypothecary or privileged creditor, without the consent of such creditor; and the Assignee shall be entitled to reserve a special hypothec or mortgage by the deed of sale as security for the payment of such part of the purchase money as shall be unpaid; and such deed may be executed before witnesses or before notaries, according to the exigency of the law of the place where the real estate sold is situate.

Form of deed  
of sale of real  
estate.

Terms which  
assignee may  
grant.

#### FORM N.

This deed, made under the provisions of the Insolvent Act of 1875, the                    day of                    &c., between A. B. of                    &c., in his capacity of Assignee of the estate and effects of                    an Insolvent, under a deed of assignment executed on the day of                    at                    in                    and of a release made and executed on the day of                    in                    (or under an order of the Judge made at                    on the day of                    ) of the one part, and C. D., of &c., of the other part, witnesseth: That he, the said A. B., in his said capacity, hath caused the sale of the real estate hereinafter mentioned, to be advertised as required by law, and hath adjudged (or and hath offered for sale pursuant to such advertisement, but the bidding therefor being insufficient did withdraw the same from such sale, and hath since by authority of the creditors agreed to sell) and doth hereby grant, bargain, sell, and confirm the same, to wit: unto the said C. D., his heirs and assigns for ever, all (*in Ontario, Nova Scotia and*

*New Brunswick, Manitoba and British Columbia, insert SEC. 76.*

"The rights and interests of the Insolvent in") that certain lot of land, &c., (*insert here a description of the property sold*) : To have and to hold the same, with the appurtenances thereof, unto the said C. D., his heirs and assigns for ever. The said sale is so made for and in consideration of the sum of \$

in hand paid by the said C. D. to the said A. B., the receipt whereof is hereby acknowledged. (*or of which the* said C. D. hath paid to the said A. B., the sum of

the receipt whereof is hereby acknowledged and the balance, or sum of \$ the said C. D. hereby promises to pay to the said A. B., in his said capacity, as follows, to wit—(*here state the terms of payment*)—the whole with interest payable

and as security for the payments so to be made, the said C. D. hereby specially mortgages and hypothecates to and in favor of the said A. B., in his said capacity, the lot of land and premises hereby sold),

In witness, &c.

A. B.	[L. S.]
C. D.	[L. S.]

Signed, sealed, and delivered  
in the presence of  
E. F.

(*This form shall be adapted in the Province of Quebec to the notarial form of execution of documents prevailing there.*)

For the effect of sheriff's sales in the Province of Quebec, see *Effect of sale in Quebec*.  
Code of Civil Procedure, Arts. 706 *et seq.*; and the Civil Code, Arts. 950, 1447 and 2081. The rights and charges not purged by such a sale are those of dower and substitution, seigniorial claims and crown ones.

In Ontario the title acquired by a purchase at sheriff's sale is that In Ontario, which was in the execution debtor at the time when the writ was placed in the sheriff's hands. A purchaser therefore under this Act would acquire the title the insolvent had at the time of the attachment, or of his assignment as the case may be.

The sale of the interest of an insolvent mortgagor in the mortgaged lands, by an assignee, will be governed, no doubt, by the

**SEC. 76.** same regulations as a similar sale by a sheriff. The Common Law Procedure Act (Con. Stats. U. C., c. 22, sec. 268) provides for such cases as follows:—

“The effect of such seizure or taking in execution, sale and conveyance of any such mortgaged lands and tenements, shall be to vest in the purchaser, his heirs and assigns all the legal and equitable interest of the mortgagor therein, at the time the writ was placed in the hands of the sheriff or other officer to whom the same is directed as well as at the time of such sale, and to vest in such purchaser, his heirs and assigns, the same rights as such mortgagor would have had if such sale had not taken place; and the purchaser, his heirs or assigns may pay, remove, or satisfy, any mortgage, charge or lien, which at the time of such sale existed upon the lands or tenements so sold, in like manner as the mortgagor might have done, and thereupon the purchaser, his heirs and assigns, shall acquire the same estate, right and title, as the mortgagor would have acquired in case the payment, removal or satisfaction, had been effected by the mortgagor.” It is probable that the provisions for a discharge of the mortgage by the mortgagee upon receiving payment of the amount due, from the purchaser, in sales by the sheriff, would be applicable to sales by an assignee. For such provisions see the section of the Com. Law Procedure Act quoted above.

The power granted to the assignee by this section and by No. 48 of the Act of 1869, of reserving a special mortgage by the deed of sale as security for the payment of part of the purchase money, was stated by Mr. Edgar, in his commentaries on the latter Act, to be a very unusual one in *Ontario* conveyancing; and in his opinion the assignee would be held entitled to take a mortgage back in a separate instrument from the deed of sale, or be able only to give a bond for a deed, or the object might be gained in one instrument by a grant to the vendee to hold to his own use until default made by him in some of the payments of the purchase money, and after such default to the use of the vendor (the assignee).

*Sales in Quebec  
may be subject  
to certain  
charges.*

**77.** In the Province of Quebec such sale may be made subject to all such charges and hypothecs as are permitted by the law of the said Province to remain chargeable thereon when sold by the sheriff, and also subject to such other charges and hypothecs thereon, as are not due at the time of sale—the time of payment whereof shall not, however, be extended by the conditions of such sale; and also subject to such other charges and hypothecs as may

be consented to in writing by the holders or creditors thereof.—And an order of re-sale for false bidding may be obtained from the judge by the Assignee upon summary petition ; and such re-sale may be proceeded with after the same notices and advertisements, and with the same effect and consequences as to the false bidder, and all others, and by means of similar proceedings as are provided in ordinary cases for such re-sales, in all essential particulars and as nearly as may be without being inconsistent with this Act. And as soon as immovables are sold by the Assignee, he shall procure from the registrar of the registration division in which each immovable is situate, a certificate of the hypothecs charged upon such immovable, and registered up to the day of the issue of the writ of attachment, or of the execution of the deed of assignment by which the estate of the Insolvent was brought within the purview of this Act, as the case may be : And such certificate shall contain all the facts and circumstances required in the registrar's certificate obtained by the sheriff subsequent to the adjudication of an immovable in conformity with the provisions of the Code of Civil Procedure, and shall be made and charged for by the registrar in like manner : And the provisions of the said Code as to the collocation of hypothecary and privileged creditors, the necessity for and the filing of oppositions for payment, and the costs thereon, shall apply thereto under this Act as nearly as the nature of the case will admit : And the collocation and distribution of the moneys arising from such sale shall be made in the dividend sheet among the creditors having privileged or hypothecary claims thereon, after the collocation of such costs and expenses, including the Assignee's commission on the amount of the sale, as were necessary to effect such sale or are incident thereto, in the same manner as to all the essential parts thereof, as the collocation and distribution of moneys arising from the sale of immovables are made in the appropriate court in ordinary cases, except in so far as the same may be inconsistent with any provisions of this Act ; but no portion of the general ex-

SEC. 77.

Sale of real estate in Quebec  
Folle enjambre.

Certificate of registrar.  
Code of Civil Procedure to apply.

Order of distribution.

**SEC. 77.** penses incurred in the winding-up of the estate, shall be chargeable to, or payable out of the said moneys, except <sup>Sale of real estate in Quebec</sup> on such balance as may remain after the payment of all privileged and hypothecary claims. The Assignee's commission on such sale shall be the same as the poundage to which the sheriff is entitled on sales made by him. Any balance remaining after the collocation of the said necessary costs and expenses, and of the privileged and hypothecary claims, shall be added to and form part of the general assets of the estate.

As to the mode and effect of re-sales for false bidding, see arts 699 & seq. of the Code of Civil Procedure of Quebec.

**Registrar's Certificate.** The registrar's certificate must contain:—all hypothecs registered against the property, as soon as hypothecs shall be thus registered, when the plan and book of reference shall be in force in the registration division; all hypothecs registered against the parties who, during the ten years previous to the sale, were owners of the immovable; and all such anterior hypothecs as were registered anew during that period. It must also contain the date of the Act registered as creating or evidencing such hypothec, the date of its registration, the names, occupation and residence of the creditor and the name of the notary or notaries before whom the Act was passed. If it is notarial, it must specify, when several immovables are seized, which of them is affected by each hypothec, mentioning, as regards each hypothec, every partial payment registered, and the amount in principal and preserved interest which appears to be due; and if the registration of a hypothec has been renewed, the certificate must mention both the registration and the renewal. But the registrar must not include hypothecs which appear by his books to have been extinguished or wholly discharged; and in searching for the hypothecs the registrar must not go beyond the date of a sheriff's title, a sale in bankruptcy or by forced licitation or of any other sale, having the effect of a sheriff's sale, or of a judgment of confirmation of title, with regard to the immovable in question, and which has been registered; except as to hypothecs which are not by such means discharged or extinguished. If there is no hypothec registered, or if all the hypothecs registered appear to have been extinguished or discharged, he must state so in his certificate. Art. 700 of the Code of Civil Procedure.

**Effect of certificate.** Creditors whose rights are thus registered need not file their claims to secure payment from the proceeds of the sale. Art 719. But if such proceeds be wholly or partially insufficient to pay a

claim, he can rank on the estate generally with the unsecured creditors, for the whole or any unpaid balance. SEC. 77.

Under the Code, oppositions for payment on claims, not registered, must be made, within six days after the return of the sheriff to the Court, stating the amount in his hands from the sale, available for distribution. Art. 720. Under this it may therefore be presumed they should be filed within six days from the deposit of the purchase money with the assignee.

The opposition should state distinctly the nature of the claim with the dates and place and documents on titles in support of its pretensions.

By the Code, the prothonotary must prepare a scheme of distribution between the sixth and twelfth day after the sheriff's return. Art. 724. Under this Act it may be assumed it should be made by the assignee within twelve days from the payment by the purchaser.

In this sheet the name of each claimant must be inserted, in numerical order, and the nature and amount of each claim, and whether it affects the whole or a part of the property. *Ibid*, art. 726.

The moneys must be divided and paid in the following order:— Ranking of claims.

I. The law costs in selling the property, &c. *Ibid*, art. 788.

II. The mortgages according to the date of registration.

III. Non-registered claims, *pro rata*, according to the provisions of this Act.

As regards the ranking of certain special privileges, which in ordinary cases may not arise, such as that of the builder, of seigniorial dues, &c., see the Civil Code, art. 2009 *et seq.*, and the Code of Procedure, art. 727 *et seq.*

A separate dividend must be prepared of the proceeds of each piece of property, (*Larivière v. Whyte and McEvila*, 11 L. C. J., p. 265.)

**78.** In the Province of Quebec any privileged or hypothecary creditor whose claim is actually due and payable, shall have the right to obtain from the judge an order on the Assignee to proceed without delay to the sale in the mode above prescribed, of any property, real or personal, which is subject to his privileged or hypothecary claim; and such creditor may also one month after the sale has taken place or one month after the Assignee has received the price thereof, if not paid at the time of the sale, obtain an order from the judge to compel the Assignee to make a dividend of the proceeds of such sale.

In Quebec privileged creditors may require sale of property subject to their privileged claims.

**SEC. 78.** This section is entirely new, and will no doubt afford a remedy for needless delays which have on more than one occasion borne hard upon the creditors referred to.

#### DIVIDENDS.

*Accounts, statements and dividends by assignee.* **79.** Upon the expiration of the period of one month from the first meeting of the creditors, or as soon as may be after the expiration of such period, and afterwards from time to time at intervals of not more than three months, the Assignee shall prepare and keep constantly accessible to the creditors, accounts and statements of his doings as such Assignee, and of the position of the estate; and he shall prepare dividends of the estate of the Insolvent whenever the amount of money in his hands will justify a division thereof, and also whenever he is required by the Inspectors or ordered by the judge to do so.

Where the estate of a bankrupt is sufficient to pay in full, and a surplus remains, interest must be allowed on all debts proved under the commission, where the debt by express contract or by statute bears interest, or where a contract to pay it is implied, but on no other debts will interest be allowed, (*in re Langstaff*, 2 Chy. 165; Rob. & J. Dig. 454.)

The deposit required to be made by foreign fire insurance companies is intended for the security of Canadian policy holders, and on the insolvency of any such company, the general creditors of the company are not entitled to share the deposit with the policy holders. (*In re the Etna Insurance Company of Dublin*, 17 Chy. 160; Rob. & J. Dig. 455.)

In case of a deficiency of assets, the costs of creditors in proving claims are to be added to the debts, and paid proportionately, and are not entitled to be paid in priority to the debts. *Ib.*

*What claims shall rank on the estate.*

**80.** All debts due and payable by the Insolvent at the time of the execution of a deed of assignment, or at the time of the issue of a writ of attachment under this Act, and all debts due but not then actually payable, subject to rebate of interest, shall have the right to rank upon the estate of the Insolvent; and any person then being, as surety or otherwise, liable for any debt of the Insolvent, and who subsequently pays such debt, shall

thereafter stand in the place of the original creditor, if SEC. 80. such creditor has proved his claim on such debt; or if <sup>Claims.</sup> he has not proved, such person shall be entitled to prove against and rank upon the estate for such debt to the same extent and with the same effect as the creditor might have done.

In the Province of Quebec the wife of the insolvent may claim <sup>Wife may claim</sup> <sub>dower.</sub> for her dower, though only payable at the death of her husband, (subject of course to a rebate on the valuation.) In this respect the maxim "*jamais mari ne paya douaire*" has no application, (*Morrison & Simpson & Thomas*, 2 Rev. Leg., p. 736; 15 L. C. J., p. 166.)

The insolvent had conveyed by way of settlement to his intended wife a lot of land on which he had commenced a house, but which was not completed until after the marriage. On a bill filed by the assignee in insolvency the court declared that for so much of the building as was completed after the marriage the creditors had a claim on the property; but gave the wife the right to elect whether she would be paid the value of her interest without the expenditure after marriage, or pay to the assignee the amount of such expenditure; and it subsequently appearing that the husband had created a mortgage prior to the settlement the wife was declared entitled to have the value of the improvements made after marriage applied in discharge of the mortgage in priority to the claims of the creditors, (*Jackson v. Bowman*, 14 Chy. 156; Rob. & J. Dig. 437.)

Where the endorser of a note became insolvent, and compounded with his creditors, including the holder of the note, who, however, reserved his recourse against the other parties to the note, and the maker also became insolvent, the endorser cannot rank on the note against the estate of the maker, so long as the holder has not been paid in full, (*Bessette et al. and La Banque du Peuple and Quevillon*, 15 L. C. J., p. 126.)

Where a claimant in insolvency has received as holder of a note a composition on the amount of his claim from the endorser, in consideration of which he has released the endorser, reserving his recourse against the other parties to the note, whatever the claimant has received from the endorser must be deducted from his claim against the makers' estate, (*Bessette & La Banque du Peuple*, 15 L. C. J., p. 126.)

Debts incurred after the execution of a deed of assignment are not <sup>Debts subsequent to assignment</sup> provable, and therefore the insolvent is not relieved from them by a <sup>ment</sup> discharge under this Act, although all assets acquired up to the time of the discharge are vested in the assignee, (See *ante*, secs 16, 38, and 39.

**SEC. 80.**  
**Rebate of interest.**

The only reasonable mode of arriving at the rebate of interest is to adopt the date of the deed of assignment, or of the issue of the writ as the period from which it is to be calculated, (Abbott, p. 40.)

This interest should be calculated at the legal rate of the province in which proceedings are being had. This is six per cent. in Ontario and Quebec.

**Revival of debt  
on failure to pay  
composition.**

The corresponding section in the Act of 1864 was held to include debts become due by non-payment of composition anterior to the Act of Insolvency. For example, by an agreement between debtor and creditor, the latter agreed to accept by way of composition certain notes of the former, payable at specified times; and it was provided that the debtor should also give his note for the whole debt, and that if he should be guilty of any default in paying composition notes, the creditor should rank on the estate for the whole debt. The notes were given—default made—and debtor became insolvent. Held in Ontario, that the stipulation was not illegal, and that there having been default before insolvency, the creditor was entitled to prove for the whole debt, (*In re McRae*, 15 Chy. Rep. 408.)

**Unliquidated  
claims.**

In Quebec it has generally been considered and thus acted upon that the creditor for damages or other claim unliquidated could claim, subject to contestation and award of the assignee, as on any other claim; but in Ontario we understand the rulings to have been otherwise, and that in such cases a judgment was required as the basis of a claim having such an origin, and this is in conformity with the English Act of 1869, s. 31. See Lee on Bank, p. 240.

With regard to the claim of the lessor, v. secs 72 *et seq. ante.*

**Landlord's  
claim.****Case of contin-  
gent claims  
provided for.**

**81.** If any creditor of the Insolvent claims upon a contract dependent upon a condition or contingency which does not happen previous to the declaration of the first dividend, a dividend shall be reserved upon the amount of such conditional or contingent claim until the condition or contingency is determined; but if it be made to appear to the judge that the estate may thereby be kept open for an undue length of time, he may, unless an estimate of the value of such claim be agreed to between the claimant and the Inspectors order that the value of such contingent or conditional claim be established by such person or persons as the claimant and the Inspectors may appoint, and in case they do not agree then by such person or persons as the Judge shall name, and the persons so named shall make their award,—which award the

**Arbitration.  
If the award be  
rejected.**

judge, after hearing the claimant and Inspectors, may SEC. 81. reject or confirm. In case the award be rejected, other <sup>Contingent</sup> persons shall be appointed as herein provided to establish <sup>claims.</sup> the value of such claim, subject to the control of the judge, and if the said award be confirmed the amount therein mentioned shall be that for which the claimant shall rank upon the estate as for a debt payable absolutely.

A stipulation in a marriage contract whereby the wife surviving is to receive in lieu of dower the interest on £1,000 during the term of her life—the principal to go to the children—is a contract depending on a contingency within the meaning of section 57 of the Insolvent Act of 1869, and, in the event of the insolvency of the husband, the assignee will be ordered to make an award upon the value of the wife's claims unless an estimate of the value is agreed to between her and the assignee, (*in re Morrison, and Sauvageau, and Simpson, and Thomas et al, contestants, S. C., 15 L. C. Jurist, p. 166.*)

A claim upon a guarantee for a sum certain when due, is provable as a debt, and before it is due it is provable as a debt due upon a contingency, (*in re Willis, 19 L. J. 30 Ex.*).

Liability to calls upon shares is not provable as a debt due upon a contingency, (*South Staffordshire Railway Company v. Burnside, 5 Exch. Rep. 129.*)

Contingent debts where the liability is remote are not provable, (*ex parte Davis, Mont. 121.*)

A., in consideration of the payment to him of a sum of money by the vendors of goods, guaranteed the payment of the purchase money by the purchasers according to the terms of the contract, viz., by the due honour of a bill of exchange accepted by the purchasers. The bill did not fall due until after the bankruptcy of the guarantor, and upon its being dishonoured the vendors were held entitled to prove, (*ex parte Brook, 6. D. M. & G. 771; s. c., D. M. & G., B. A. 551.*)

**82.** In the preparation of the dividend sheet due regard shall he had to the rank and privilege of every creditor,—which rank and privilege, upon whatever they may legally be founded, shall not be disturbed by the provisions of this Act, except in the Province of Quebec where the privilege of the unpaid vendor shall cease from the delivery of the goods sold ; but no dividend shall be allotted or paid to any creditor holding security from the estate of the Insolvent for his claim, until the amount for

Rank and privilege of creditors: Proviso as to creditors holding security.

**Sec. 82.** which he shall rank as a creditor upon the estate as to dividends therefrom, shall be established as hereinafter provided; and such amount shall be the amount which he shall be held to represent in voting at meetings of creditors, and in computing the proportion of creditors, whenever under this Act such proportion is required to be ascertained.

**Unpaid vendor.** This section contains an important change in the law of the Province of Quebec. The privilege of the unpaid vendor of a preference on the price of the things sold has hitherto been protected in that province, by the common law of the country, and, since the promulgation of the code, by its provisions, (see arts. 1998 *et seq.*) The constitutionality of the change attempted by this section is certainly doubtful, and is likely to come up for adjudication in the courts.

This section only refers to the ranking of the creditor on the estate and the preparation of a dividend sheet. The right of stoppage *in transitu* still remains intact. It may also be doubted whether the right of revendication, which the unpaid vendor has under certain circumstances in the Province of Quebec, is affected by the clause under consideration.

**Landlord.** The privilege of the landlord on the proceeds of the effects found on the premises leased, has precedence over the privilege of the assignee and the insolvent for the costs of their respective discharge under the Act of 1864; and reform of the dividend sheet ordered accordingly, (*Morgan Ins. v. Whyte, and Biron* contest. 13 L. C. Jur. 187.) See sec. 72 *ante*.

**Voting of secured creditor.** The provision for the voting of the secured creditor contained in this section places his vote upon a proper footing. For, if a creditor could vote upon the nominal amount of his claim, without reference to his security, the hypothecary creditor would often control the management of the personal property, without being interested in it to any considerable extent." Abbott on Act of 1864, p. 41.

**Seizure in execution after appointment of assignee.** **83.** No lien or privilege upon either the personal or real estate of the Insolvent shall be created for the amount of any judgment debt, or of the interest thereon, by the issue or delivery to the sheriff of any writ of execution, or by levying upon or seizing under such writ the effects or estate of the Insolvent, if before the payment over to the plaintiff of the moneys actually levied under such writ, the estate of the debtor has been assigned to an Assignee, or if proceedings to place the same in liquidation under this Act, have been adopted and are still pending. But

**Proviso as to costs.**

this provision shall not affect any lien or privilege for costs which the plaintiff possesses under the law of the Province in which such writ shall have been issued.

A payment by the sheriff, under a judgment of distribution, to an opposant therewith collocated, at a time when such opposant was no longer possessed of his estate (having assigned the same under the Act) is good, and cannot be questioned subsequently by the assignee, (*Salvas v. Levreau*, and Gendron, oppt., and Stewart, assignee, petr, and Taché, sheriff, C. of R. 18 L. C. J., p. 293.)

A stay of proceedings given to a sheriff on a writ of execution in his hands by the attorney for the execution creditor is equivalent to a withdrawal of the writ; and an execution cannot be said to be in the sheriff's hands to be executed until the stay is removed and the sheriff ordered to proceed; and it was held under the Act of 1865 that if an assignment was made within thirty days from the removal of the stay of proceedings the judgment creditor lost any privilege by the operation of the 13th section, except the costs of suit which might be proved as a privileged claim before the assignee, (*in re Fair and Buist*, 2 L. J. U. C. (N.S.) 216.)

**84.** If a creditor holds security from an Insolvent, or from his estate, or if there be more than one Insolvent liable as partners, and the creditor holds security from, or the liability of one of them as security for a debt of the firm, he shall specify the nature and amount of such security or liability in his claim, and shall therein on his oath put a specified value thereon; and the Assignee, under the authority of the creditors, may either consent to the right to rank for such liability, or to the retention of the property or effects constituting such security or on which it attaches by the creditor, at such specified value, or he may require from such creditor an assignment of such liability, or an assignment and delivery of such security, property or effects, at an advance of ten per centum upon such specified value, to be paid by him out of the estate so soon as he has realized such security, in which he shall be bound to the exercise of ordinary diligence; and in either of such cases the difference between the value at which the liability or security is retained or assumed and the amount of the claim of such creditor, shall be the amount for which he shall rank and vote as aforesaid; and if a creditor holds a claim based

As to creditors holding security for their claims.

**Sec. 84.** upon negotiable instruments upon which the Insolvent is only indirectly or secondarily liable, and which is not mature or exigible, such creditor shall be considered to hold security within the meaning of this section, and shall put a value on the liability of the party primarily liable thereon as being his security for the payment thereof; but after the maturity of such liability and its non-payment he shall be entitled to amend and revalue his claim.

If a creditor prove a debt, in ignorance that he has a lien in respect of it, he will not be allowed, upon discovering his mistake, to set up his lien and reduce his proof accordingly, (*ex parte Spottiswood*, Fonbl. Rep. 20). This decision is striking, and its soundness would certainly seem to be questionable.

Where a mortgagor becomes bankrupt the mortgagee is not obliged to file a claim, but is at liberty, instead, to exercise the power of sale contained in his mortgage. In the Court of Chancery an injunction to restrain such a sale was refused, (*Gordon v. Ross*, 1 L. J. U. C. (N.S.), 106.)

If security is on  
realty or ship-  
ping.

**85.** But if the security consists of a mortgage upon real estate, or upon ships or shipping, the property mortgaged shall only be assigned and delivered to the creditor, subject to all previous mortgages, hypothecs and liens thereon, holding rank and priority before his claim, and upon his assuming and binding himself to pay all such previous mortgages, hypothecs and liens, and upon his securing such previous charges upon the property mortgaged, in the same manner and to the same extent as the same were previously secured thereon; and thereafter the holders of such previous mortgages, hypothecs or liens, shall have no further recourse or claim upon the estate of the Insolvent; and if there be mortgages, hypothecs or liens thereon, subsequent to those of such creditor, he shall only obtain the property by consent of the subsequently secured creditors; or upon their filing their claims specifying their security thereon as of no value, or upon his paying them the value by them placed thereon; or upon his giving security to the Assignee that the estate shall not be troubled by reason thereof.

**86.** Upon a secured claim being filed, with a valuation of the security, it shall be the duty of the Assignee, to procure the authority of the Inspectors or of the creditors at their first meeting thereafter, to consent to the retention of the security by the creditor, or to require from him an assignment and delivery thereof; and if any meeting of Inspectors or of creditors takes place without deciding upon the course to be adopted in respect of such security the Assignee shall act in the premises according to his discretion and without delay.

**87.** The amount due to a creditor upon each separate item of his claim at the time of the execution of a deed of assignment, or of the issue of a writ of attachment, as the case may be, and which shall remain due at the time of proving such claim, shall form part of the amount for which he shall rank upon the estate of the Insolvent, until such item of claim be paid in full, except in cases of deduction of the proceeds or of the value of his security, as hereinbefore provided; but no claim or part of a claim shall be permitted to be ranked upon more than once, whether the claim so to rank be made by the same person or by different persons; and the Assignee may at any time require from any creditor a supplementary oath declaring what amount, if any, such creditor has received in payment of any item of the debt upon which his claim is founded, subsequent to the making of such claim, together with the particulars of such payment; and if any creditor refuses to produce or make such oath before the Assignee within a reasonable time after he has been required so to do, he shall not be collocated in the dividend sheet.

**88.** If the Insolvent owes debts both individually and as a member of a co-partnership, or as a member of two different co-partnerships, the claims against him shall rank first upon the estate by which the debts they represent were contracted, and shall only rank upon the other after all the creditors of that other have been paid in full.

By the 102 clause of the English Act of 1869, the property of part

SEC. 86.  
Proceedings on  
the filing of a  
secured claim.

Rank of several  
items of a cre-  
ditor's claim.

Oath of creditor  
as to non-pay-  
ment of his  
claim.

Insolvent ow-  
ing debts as a  
partner.

**SEC. 88.** ners successively becoming bankrupt rests in the same trustee. This facilitates the winding-up.

**Insolvent owing debts as partner.** The 104 section of the English Act provides that to save expense in the case of joint and separate estates the dividends shall, as far as possible, be declared together, and the costs proportionately divided. It would be well to follow the same rule in the administration of estates here.

When a firm, or when two or more partners of a firm, are jointly placed in insolvency, all the joint property of the bankrupts, as well as all the separate property of each of them, vests in the assignee, (*Graham v. Mulcaster*, 4 Bing. 115). One of two partners, a few days before a writ of attachment against both, under the Insolvent Act of 1864, had issued, assigned his estate for the benefit of his creditors; and it was held that this assignment was void as against the joint assignees, (*Wilson v. Stevenson*, 12 Grant, 239).

Where each of the members of a firm is separately adjudged bankrupt, the assignees of them all cannot recover in one action debts due to the firm, and also debts due to the partners separately. The assignees of each partner must sue alone for the recovery of debts due to him only, (*Hancock v. Haywood*, 3 T. R. 433).

In a firm of two partners, where one partner dies, and the other becomes bankrupt, the assignees of the latter are entitled to institute a suit in behalf of themselves and all the other creditors of the deceased against his executors, for the administration of his estate, and payment of what may be due therefrom to his surviving partner, (*Addis v. Knight*, 2 W. R. 119). In such cases the assignees do not become co-partners with the solvent partner. Like purchasers from the sheriff under an execution against one partner the assignees and the solvent partner become tenants in common of the real and personal property belonging to the firm, (*Fox v. Hanbury*, 2 Cowp. 448.)

Where a person is engaged in two trades, alone in one, but with a co-partner in another, there is no right of proof in respect of his dealings as such sole trader against the estate of his co-partner, (*ex parte Hinton*, De. G. 550.)

**Can an insolvent prove on the estate of a firm of which he is a member.** Although, as a general rule, one partner cannot prove against another partner, partners engaged individually in distinct concerns may prove against a separate trade, (*ex parte Shakes aft* referred to in *ex parte Ruffin*, 6 Ves. 123; *Curtis vs. Perry*, Ib. 743, 747; *ex parte St. Barbe*, 11 Ves. 413; *ex parte Hesham*, 1 Rose, 146; *ex parte Stillitoe*, 1 Gl. & J. 374.) If one partner of a firm is also a partner in a distinct firm, the two firms may prove against each other, (*ex parte Thompson*, 3 Dea. & Ch. 612; 1 Mo. & A. 324.)

The assignees of a bankrupt partner are entitled to an account not only of the assets as they stood at the time of the dissolution of the firm, but also of the profits subsequently made by the employment of the bankrupt's capital in the partnership business, (*Crawshay v. Collins*, 15 Ves. 218; *Smith v. DeSilva*, Cowp. 469.) Unless there be some misconduct on the part of the solvent partners, or unless the solvent partners are dead or abroad, the assignees have no right to interfere in the management or winding-up of the partnership business. If they do interfere a court of equity will restrain them by injunction at the suit of the solvent partners, (*Allan v. Kilbee*, 4 Madd. 464). Nor can the assignees compel the solvent partner to deliver up the books of the partnership, (*ex parte Finch*, 1 D. & C. 274). However, in the case of solicitors this rule has been questioned, because the clients have a voice in the control of the papers, (*Davidson v. Napier*, 1 Sim. 297). The solvent partners can always be summoned before the Court, and be compelled to produce the partnership books, and to answer questions relative to the dealings of the firm, (*ex parte Trueman*, 1 D. & C. 464; *ex parte Levett*, 1 G. & J. 185).

And see *ex parte Maude, in re Braginton*, 2 L. R. Chy. 550; *ex parte Carne, in re Whitford*, 3 L. R. Chy. 463.

**89.** The creditors, or the same proportion of them that may grant a discharge to the debtor under this Act, may allot to the Insolvent, by way of allowance, any sum of money, or any property they may think proper; and the allowance so made shall be inserted in the dividend sheet, and shall be subject to contestation like any other item of collocation therein, but only on the ground of fraud or deceit in procuring it, or of the absence of consent by a sufficient proportion of the creditors.

The proportion required is the majority in number of creditors for amounts exceeding \$100 representing at least three-fourths of the total amount of such claims: v. sec. 52 *ante*.

**90.** No costs incurred in suits against the Insolvent after due notice has been given according to the provisions of this Act, of an assignment, or of the issue of a writ of attachment in liquidation, shall rank upon the estate of the Insolvent; but all the taxable costs incurred in proceedings against him up to that time shall be added to the demand for the recovery of which such proceedings were instituted; and shall rank upon the estate as

**SEC. 90.** if they formed part of the original debt, except as herein otherwise provided.

**Privilege of  
clerks, &c., for  
wages.**

**They may be  
employed.**

**Traveller, mate  
of vessel, &c.,  
within section.**

**Laborer.**

**Misconduct of  
clerk.**

**Wages must be  
entered on divi-  
dend sheet.**

**91.** Clerks and other persons in the employ of the Insolvent in and about his business or trade shall be collocated in the dividend sheet by special privilege for any arrears of salary or wages due and unpaid to them at the time of the execution of a deed of assignment, or of the issue of a writ of attachment under this Act, not exceeding three months of such arrears, and also for such salary or wages for a period not exceeding two months of the unexpired portion of the then current year of service,— during which period they shall be bound to perform, under the direction of the Assignee, any work or duty connected with the affairs of the Insolvent, and which the Insolvent himself might have directed them to perform under their respective engagements; and for any other claim they shall rank as ordinary creditors.

By the Act of 1869, (sec. 67), the privilege was for four months, but no provision was made for any period after the estate coming into the assignee's hands. The English Act limits the amount of this privilege to £50.

A person engaged as a traveller at an annual salary comes within the clause, (*ex parte Neal*, Mo. & Mac., 194.) So does the mate of a vessel, at certain wages, hired by the master who was also one of the owners, (*ex parte Homborg*, 2 M. D. & D. 642.)

As to laborers, workmen and weekly servants, v. *ex parte Grellier*, Mont. 264; *ex parte Crawford*, Mont. 270; *ex parte Ball, in re Byrom*, 3 D. M. & G. 155; *ex parte Collier*, 4 Dea. & C. 520; *ex parte Humphreys*, 3 Dea. & C. 114.

It has been questioned whether the misconduct of the clerk will deprive him of the benefit of this provision, (*ex parte Hampson in re Burkhill*, 2 M. D. & D. 462). Where the clerk had left the service several months before the bankruptcy but the leaving was not voluntary, he was held to be within the section as clerk to the bankrupt, (*ex parte Sanders*, 2 Mon. & A. 684.)

A demand for wages was made as a preferred claim to an assignee. The creditors at a meeting passed a resolution authorizing the assignee to pay all claims for wages, but the assignee refused payment of this claim as made. At this time no dividend sheet had been prepared. A summons was subsequently issued by the county Judge, calling on the assignee to shew cause why he should not pay the

claim, and the assignee not appearing, the evidence was taken before SEC. 91.  
the Judge, and an order made for the payment forthwith, with costs,  
of a sum less than the original demand:—Held, that the direction by the creditors to pay these preferential claims without putting them on the dividend sheet was illegal, (*in re Cleghorn and the Judge of the County of Elgin and Nunn*, 2 L. J. (N. S.) 133; C. L. Chamb. Richards, Rob. & J. Dig. 422.)

**92.** So soon as a dividend sheet is prepared, notice thereof (Form O) shall be given by advertisement, and by letter posted to each creditor, inclosing a copy of the dividend sheet noting the claims objected to, and after the expiry of eight days from the day of the last publication of such advertisement, all dividends which have not been objected to within that period shall be paid.

### FORM O.

#### INSOLVENT ACT OF 1875.

In the matter of

A. B., (or A. B. & Co.,)

an Insolvent.

A dividend sheet has been prepared, open to objection, until the day of , after which dividend will be paid.

(Place.)

(Date.)

*Signature of Assignee.*

Until notice by advertisement, according to the form prescribed, the dividend sheet is incomplete, and conveys no rights to any creditor. The Court will, therefore, on petition of a creditor, prohibit payments being made thereon, (*Larivière v. Whyte, & McEvila*, 11 L. C. J. 265.)

Held in Ontario, that an action may be brought against an assignee in insolvency for a dividend on a duly collocated claim which has not been objected to, (*Simpson v. Newton*, L. J. for 1868, p. 46.)

But it would seem to be a mere correct procedure to petition the court or judge to whose jurisdiction the assignee is subject, v. sec. 125 post. In fact the English statute, sec. 46, expressly enacts that such shall be the remedy adopted, and gives the court the power to order the assignee to personally pay interest.

**SEC. 93.** **93.** It shall be the duty of the Inspectors to examine <sup>Contestation of</sup> with the Assignee the claims made against the estate, <sup>claims by as-</sup> and also each dividend sheet before the expiration of the <sup>inspectors'</sup> delay within which the same may be objected to, and to <sup>instruction.</sup>

instruct the Assignee as to which claims or collocations should be contested by and on behalf of the estate, whereupon contestation shall be entered and made in the name of the Assignee or of the Inspectors or of some individual creditors consenting thereto, and shall be tried and determined by the court or judge; and the costs of such contestation, unless recovered from the adverse party, shall be paid out of the funds belonging to the estate.

**Claims not filed, how dealt with.** **94.** If it appears to the Assignee on his examination of the books of the Insolvent, or otherwise, that the

Insolvent has creditors who have not taken the proceedings requisite to entitle them to be collocated, it shall be his duty to reserve dividends for such creditors according to the nature of their claims, and to notify them of such reserve, which notification may be by letter through the post, addressed to such creditors' residences, as nearly as the same can be ascertained by the Assignee; and if such creditors do not file their claims and apply for such dividends previous to the declaration of the last dividend of the estate, the dividends reserved for them shall form part of such last dividend.

This should not be construed to mean that if the creditor does not demand his dividend, as well as file his claim, he will be deprived of it; for that would place this class of creditors in a different position from all others. But the filing of the claim should be held to be an application for a dividend under this clause. And if the creditor does not afterwards claim the amount awarded him, the rule as to unclaimed dividends (sec. 98 below) must be followed, (Abbott, p. 44).

**Claims on dividends objected to, how determined.** **95.** If any claim be objected to at any time, or if any dividend be objected to within the said period of eight days, or if any dispute arises between the creditors of the Insolvent, or between him and any creditor, as to the amount of the claim of any creditor, or as to the ranking or privilege of the claim of any creditor upon such dividend sheet, the objection shall be filed in

writing by or before the Assignee who shall make a SEC. 95. record thereof; and the grounds of objections shall be distinctly stated in such writing, and the party objecting shall also file at the same time the evidence of previous service of a copy thereof on the claimant; and the claimant shall have three days thereafter to answer the same,—which time may, however, be enlarged by the judge, with a like delay to the contestant to reply; and upon the completion of an issue upon such objection, the Assignee shall transmit to the clerk of the court the dividend sheet or a copy thereof with all the papers and documents relating to such objection or contestation. and any party to it may fix a day, of which two days' notice shall be given to the adverse party, for proceeding to take evidence thereon before the judge, and shall thereafter proceed thereon from day to day until the evidence shall have been closed, the case heard and the judgment rendered,—which judgment shall be final, unless appealed from in the manner hereinafter provided: the proceedings on the said objection or contestation shall form part of the records of the court, and the judgment shall be made executory as to any condemnation for costs, in the same manner as an ordinary judgment of the court.

Hearing and decision thereon.

Judgment executory.

An important change is made by this section in providing for the contestation being carried on before a judge after issue joined.

This change which might otherwise prove beneficial is scarcely likely to meet the favor of the judges of the Superior Court at Montreal, already overworked, and affords an additional reason for appointing, as we have already suggested, a special commissioner or judge in bankruptcy.

**96.** The creditors, and in their default the Inspectors may by resolution authorize and direct the costs of the contestation of any claim or of any dividend, to be paid out of the estate, and may make such order either before, pending, or after any such contestation; they may also, with the sanction of the judge, authorize the payment out of the estate of any costs incurred for the general interest of the estate, whether such costs were incurred by the Assignee, the Inspectors or any individual creditor.

Creditors or  
inspectors may  
order contesta-  
tion of claims,  
&c.

## SEC. 97.

**97.** If, at the time of the issue of a writ of attachment, or the execution of a deed of assignment, any immovable property or real estate of the Insolvent be under seizure, or in process of sale, under any writ of execution or other order of any competent court, such sale shall be proceeded with by the officer charged with the same, unless stayed by order of the judge upon application by the Assignee, upon special cause shewn, and after notice to the plaintiff,—reserving to the party prosecuting the sale his privileged claim on the proceeds of any subsequent sale, for such costs as he would have been entitled to out of the proceeds of the sale of such property, if made under such writ or order; but if such sale be proceeded with, the moneys levied therefrom shall be returned into the court on whose order the sale has been made, to be distributed and paid over to the creditors who shall have any privilege, mortgage, or hypothecary claims thereon, according to the rank or priority of such claims; and the balance of such monies after the payment of such claims shall be ordered to be paid to the Assignee to be distributed with the other assets of the estate.

See notes to sec. 83<sup>ante</sup>.

This section differs from the portion of the Act of 1869 bearing on the same subject, in providing for the payment into court of the monies levied, instead of into the hands of the assignee.

M, under a *fl. fa.* at his own suit, against D, which was the first in the sheriff's hands, purchased certain lands in September, 1867. D had in April previous made a voluntary assignment under the Insolvent Act of 1864, to an official assignee, who claimed the proceeds of the sale under a section of the amending Act similar to this. M claimed a conveyance from the sheriff, crediting the purchase money on his judgment. The court, under these circumstances, discharged with costs an application by M for a mandamus to compel the sheriff to convey, to which the assignee was no party. (*In re Moffatt and the Sheriff of the County of York*, 27 Q. B. U. C. 52).

Unclaimed dividends, how dealt with.

**98.** All dividends remaining unclaimed at the time of the discharge of the Assignee shall be left in the bank where they are deposited, for three years, and, if still unclaimed, shall then be paid over by such bank with interest accrued thereon, to the Government of Canada,

and if afterwards duly claimed shall be paid over to the SEC. 99. persons entitled thereto, with interest at the rate of four <sup>Unclaimed dividends.</sup> per centum per annum from the time of the reception thereof by the Government.

**99.** If any balance remains of the estate of the Insolvent, or of the proceeds thereof, after the payment in full of all debts due by the Insolvent, such balance shall be paid over to the Insolvent upon his petition to that effect, duly notified to the creditors by advertisement and granted by the judge.

Where the estate of the bankrupt is sufficient to pay twenty shillings in the pound, and a surplus still remains, interest should be allowed on all debts proved before the assignee, where the debt by express contract, or statutory enactment bears interest, or where a contract to pay it is to be implied, before the surplus is handed over to the bankrupt. (*In re Langstaffe*, 2 Grant, 165; *in re Holland*, 1 Ba. & Ins. 153. As to methods of calculating, *in re Higginbottom*, 2 Gl. & J. 123.)

See sec. 45 of English Act of 1869 and English General Rule 137.

#### PROCEDURE GENERALLY.

**100.** Whenever a meeting of creditors cannot be held, or an application made, until the expiration of a delay allowed by this Act, notice of such meeting or application may be given pending such delay.

**101.** Notices of meetings of creditors shall be given by publication thereof for at least two weeks in the official Gazette of the Province in which they are to take place, and by such other notice as the judge or Inspectors may direct:—and in every case of a meeting of creditors the Assignee shall address notices thereof to the creditors and to all the representatives within the Dominion of foreign creditors, and shall mail the same at least ten days before the day on which the meeting is to take place, the postage being prepaid by such Assignee: in other cases not provided for the Assignee shall advertise as directed by the Inspectors or the judge.

Cases unprovided for.

**SEC. 102.** **102.** All questions discussed at meetings of creditors How questions shall be decided at meetings. shall be decided by the majority, in number and in value, of the creditors having a right to vote under section two,

present or represented at such meeting, and representing also the majority in value of such creditors, unless herein otherwise specially provided; but if the majority in number do not agree with the majority in value, the views of each section of the creditors shall be embodied in resolutions, and such resolutions, with a statement of the vote taken thereon, shall be referred to the judge who shall decide between them.

In a case under the Act of 1864, where there was a disagreement between the majority in number and the majority in value, and the motion to adjourn was opposed by the majority in value, it was held that neither party could legally oppose the adjournment if insisted upon by the other, because by doing so either party would have the power to prevent an adjudication between them by the Judge, who in this case and in other instances (secs. 28, 77, 103, 105) is to be the referee on divisions or differences arising. (*Re Lamb*, 17 C. P. U. C. 173; and see *Re Lamb*, 13 Grant, 391.)

What matters may be voted upon, &c., at first meeting of creditors.

**103.** If the first meeting of creditors, which takes place after the expiry of the period of three weeks from the first advertisement calling such meeting, be called for the ordering of the affairs of the estate generally and it be so stated in the notices calling such meeting, all the matters and things respecting which the creditors may vote, resolve or order, or which they may regulate under this Act, (except when otherwise specially provided), may be voted, resolved or ordered upon and may be regulated at such meeting, without having been specially mentioned in the notices calling such meeting,—due regard being had, however, to the proportions of creditors required by this Act for any such vote, resolution, order or regulation.

Very full powers are given the creditors at their first meeting, and rightly so; for it is then matters require most attention, and as a rule it is the one when the largest number of creditors are present.

The matters which usually may be decided upon, on that occasion, are the following:—

1. The appointment of the Assignee. Sec. 29.

2. The security to be given by the Assignee. Secs. 28 and 29. **SEC. 103.**  
 3. The enactment of rules for the guidance of the Assignee. Sec. ~~First meeting.~~  
 38.  
 4. The appointment of inspectors and their remuneration. Sec.  
 35.  
 5. The reception of the report of the Official Assignee of the estate.  
 6. Upon any offer of composition which may be made by the Insolvent. Sec. 35.  
 7. The continuance or cessation of the lease of premises occupied by the Insolvent. Sec. 71.  
 8. The place where subsequent meetings are to be held. Sec. 34.  
 9. The disposal of the estate of the Insolvent. Sec. 36.  
 10. The examination of the Insolvent. Sec. 23, &c.

**104.** The claims of creditors furnished to the Assignee Form and proof  
of claims. in the Form P, attested under oath and accompanied by the vouchers on which they are based, or, when vouchers cannot be produced, accompanied by such affidavit or other evidence as in the opinion of the Assignee shall justify the absence of such vouchers, shall be considered as proved unless contested,—in which case the claims shall be established by legal evidence on the points raised.

### FORM P.

#### INSOLVENT ACT OF 1875.

Form of claim.

In the matter of

A B.,

An Insolvent, and

C D.,

Claimant.

I, C. D., of , being duly sworn in  
depose and say:

1. I am the claimant (*or*, the duly authorized agent of the claimant in this behalf, and have a personal knowledge of the matter hereinafter deposed to, *or* a member of the firm of claimants in the matter, and the said firm is composed of myself and of E. F. ,)
2. The Insolvent is indebted to me (*or* to the claimant) in the sum of dollars, for (*here state the*

**SEC. 104. nature and particulars of the claim, for which purpose reference may also be made to accounts or documents annexed.)**

3. I (or the claimant) hold no security for the claim, (or I or the claimant hold the following, and no other, security for the claim, namely : state the particulars of the security.)

To the best of my knowledge and belief, the security is of the value of                    dollars.

Sworn before me at  
this                    day of                    }  
    } And I have signed.

The requirement of the production of the vouchers upon which the claim is based is new, and may be found inconvenient, if they are to be left with the assignee as the section would seem to imply. It would probably be found sufficient to require merely their exhibition deposit of copies.

Affidavits,  
before whom  
sworn.

**105.** Any affidavit required in proceedings in Insolvency may be made by the party interested, his agent or other party having a personal knowledge of the matters therein stated, and may be sworn in Canada before the Assignee or before any Official Assignee, Judge, Notary Public, Commissioner for taking affidavits, or Justice of the Peace, and out of Canada before any Judge of a Court of Record, any Commissioner for taking affidavits appointed by any Canadian Court, any Notary Public, the chief municipal officer for any town or city, or any British Consul or Vice Consul, or before any person authorized by any Statute of the Dominion or of any Province thereof, to take affidavits to be used in any court of justice in any part of the Dominion.

Surrender of  
security by cre-  
ditor, and effect  
thereof.

**106.** A creditor holding a mortgage, hypothec, lien, privilege or collateral security on the estate of a debtor, or on the estate of a third party for whom such debtor is only secondarily liable, may release or deliver up such security to the Assignee, or he shall by his affidavit for the issue of a writ of attachment, or by an affidavit filed with the assignee at any time before the declaration of a final dividend, set a value upon such security ; and from

the time he shall have so released or delivered up such **SEC. 106.**  
 security, or shall have furnished such affidavit, the debt ~~Secured claims.~~  
 to which such security applied shall be considered as an  
 unsecured debt of the estate or as being secured only to  
 the extent of the value set upon such security ; and the  
 creditor may rank as and exercise all the rights of an  
 ordinary creditor, for the amount of his claim, or to the  
 extent only of any balance thereof above and beyond the  
 value set upon such security, as the case ~~may~~ be.

\* This section, which is new, would more connectedly have been placed after section 86 *ante*, as bearing on the same subject.

**107.** The law of set-off, as administered by the courts, ~~Set-off, how allowed.~~  
 whether of law or equity, shall apply to all claims in insolvency and also to all suits instituted by an Assignee for the recovery of debts due to the Insolvent, in the same manner and to the same extent as if the Insolvent were plaintiff or defendant, as the case may be, except in so far as any claim for set-off shall be affected by the provisions of this Act respecting frauds or fraudulent preferences.

The plaintiff purchased barley from R, telling him to consign it to C, and draw on C for the purchase money. C was to keep the barley as plaintiff's agent until the plaintiff directed him to sell, the plaintiff paying him such a sum as he might require by way of margin to protect himself against a fall in price. C, to reimburse his advance on R's draft, obtained a discount from the bank on his own note secured by the warehouse receipt for the barley, which he transferred to the bank. While C held the barley the plaintiff paid to him \$540 as margin to hold it. The barley was shipped by plaintiff's instructions to Oswego, to the order of the bank, where it was sold, and the bank received the proceeds on the 2nd December, having previously had notice that the plaintiff owned the barley. About the 17th November C left the country and an attachment in insolvency having issued against him, an interpleader was directed to try whether the balance of such proceeds above the bank's advances belonged to his assignee or to the plaintiff:—Held, that the plaintiff was entitled to it, for the barley was his, and the money, the proceeds of its sale, never came into C's hands, or was mixed with his general assets. C had advanced by paying R's draft more than the proceeds of the barley, and it was contended, therefore, that there was no surplus available for the plaintiff, but held, that the plaintiff was entitled to

**SEC. 107.** deduct from such advance the sums paid by way of margin. After Set-off, C had absconded the plaintiff went to his office to ask about his barley, and there saw R, the manager of C's business, who went with him to the bank and had a conversation with the cashier:—Held, that their evidence of what passed was clearly admissible, (*Cotter v. Mason*, 30 Q. B. 181, 417.)

**Debt must be provable.** The debt due from the bankrupt to the creditor must be such as might be proved under the bankruptcy, otherwise it cannot be set-off; and the mutual credits must be given before the bankruptcy, so as to make the balance claimed due at the time of the bankruptcy, (*Hewison v. Guthrie*, 3 Scott, 298.) If a banker receives and pays money on account of a bankrupt, after notice of his bankruptcy, he cannot set-off the payments against the receipts, as against the assignee, (*Vernon v. Hankey*, 2 T. R. 113; *Raphael v. Birdwood*, 5 Prince, 604).

**Must be due in same right.** Debts to be set-off, however, must both be due in the same right; a debt due to an executor cannot set-off against a debt due from him in his own right, (*Bishop v. Church*, 3 Atk. 691). A debt due by an insolvent to a firm cannot be set-off against a private debt due from one of the partners to the insolvent, (*ex parte Soames*, 3 D. & C. 320).

Where an assignee has reason to doubt the fairness of a creditor's set-off, and has the option of suing either by action *ex contractu*, as assumpsit, debt, &c., or by action *ex delicto*, as trover, case, &c., he should adopt the latter; for in actions *ex delicto* the defendant cannot set-off any debt due to him by the bankrupt, (*Wilkins v. Carmichael*, 1 Doug. 101; *Key v. Flint*, 8 Taunt. 21). A bankrupt on the eve of bankruptcy sold and delivered goods to one of his creditors for the purpose of giving him a fraudulent preference, and the assignees afterwards brought an action of assumpsit against him, to recover the amount of the goods; it was held that although the assignees might have disaffirmed the contract of the bankrupt, and have recovered the value of the goods in trover, in which case there could have been no set-off, yet, as they had sued in assumpsit, and thereby confirmed the contract, the creditor was entitled to set-off his debt, (*Smith v. Hodson*, 4 T. R. 211).

**Creditor may recover amount paid in error.** If, by mistake, a creditor pay the assignees the whole amount of his debt, without deducting his set-off, he may afterwards recover it from the assignees as money had and received to his use, (*Bise v. Dickson*, 1 T. R. 285).

See in reference to this section, section 135 *post*.

By that sec. any transfer of a debt made within thirty days of the **SEC. 107.**  
 assignment, or writ of attachment, for the purpose of enabling the Set-off.  
 debtor to set-off against his liabilities, is null; if at the time he knew, Fraudulent  
 or had probable cause for believing, the Insolvent to be unable to transfer of debt.  
 meet his engagements.

A debt of an Insolvent transferred to a person who is a debtor of such insolvent, within the 30 days preceding the assignment by the Insolvent under the Act, cannot be offered in compensation by such debtor, particularly when his own debt was not due at the time of such transfer, and did not become due until after the assignment by the Insolvent, (*Riddell v. Reay*, S. C. 18 L. C. J., p. 130.)

Compensation in Quebec takes place by the sole operation of law Compensation  
 between debts which are equally liquidated and demandable, and in Quebec,  
 have each for object a sum of money or a certain quantity of deter-  
 minate things of the same kind and quality, Civil Code, Art. 1188.

**108.** Except when otherwise provided by this Act, Service of  
 one clear juridical day's notice of any petition, motion, papers under  
 order on rule, shall be sufficient, if the party notified this act.  
 resides within fifteen miles of the place where the pro-  
 ceeding is to be taken, and one extra day shall be suffi-  
 cient allowance for each additional fifteen miles of dis-  
 tance between the place of service and the place of pro-  
 ceeding; and service of such notice shall be made in  
 such manner as is now prescribed for similar services in  
 the Province within which the service is made.

**109.** The judge shall have the same power and Commission for  
 authority in respect of the issuing and dealing with com- examination of  
 missions for the examination of witnesses, as are possessed  
 by the ordinary courts of record in the Province in which  
 the proceedings are being carried on.

See arts 307 *et seq.* of the Code of Civil Procedure, Quebec.

The issue of commissions for the examination of witnesses in Courts of Record in Ontario is principally regulated by the following sections of chapter 32 Con. Stats. U. C.:—

“ Sec. 19.—In case the plaintiff or defendant in any action in either Rules for issu-  
 of the Superior Courts of Common Law, or in any County Court, is ing in Quebec.  
 desirous of having at the trial thereof, the testimony of any aged or Rules for issu-  
 infirm person resident within Upper Canada, or of any person who ing in Ontario,  
 is about to withdraw therefrom, or who is residing without the limits  
 thereof, the Superior Court in which the action is pending or a judge  
 of either of such Courts, or the County Court in which the action is

**SEC. 109.** pending, or a judge thereof, may, upon the motion of such plaintiff or defendant, and upon hearing the parties, order the issue of one or more commission or commissions under the seal of the Court in which the action is pending to one or more Commissioner or Commissioners, to take the examination of such person or persons respectively, (2 G. 4. C. 1, 517, 20 Vic. C. 58, S. 5).

Commissions  
to examine  
witnesses.

" 20. Due notice of every such Commission shall be given to the adverse party, to the end that he may cause the witnesses to be cross-examined, (20 V. C. 58, S. 5).

" 21. In case the examination of any witness or witnesses taken without the limits of Upper Canada, pursuant to any such commission be proved by an affidavit of the due taking of such examination sworn before and certified by the Mayor or Chief Magistrate of the city or place where the same has been taken, and in case such commission with such examination and affidavit thereto annexed be returned to the Court from which such commission issued close under the hand and seal of one or more of the Commissioners the same shall *prima facie* be deemed to have been duly taken, executed and returned and shall be received as evidence in the cause, unless it be made to appear to the Court in which such examination is returned and published, or before which the same is offered in evidence, that the same was not duly taken; or that the deponent is of sound mind, memory, and understanding, and living within the jurisdiction of the Court at the time such examination is offered in evidence to such Court."

V. Edgar, (126).

Subpoenas to  
witness.

**110.** In any proceeding or contestation in insolvency, the court or judge, may order a writ of *subpoena ad testificandum* or of *subpoena duces tecum* to issue, commanding the attendance as a witness of any person within the limits of Canada.

Service of pro-  
cess, &c.

**111.** All rules, writs of subpoena, orders and warrants, issued by any court or judge in any matter or proceeding under this Act, may be validly served in any part of Canada upon the party affected or to be affected thereby; and the service of them, or any of them, may be validly made in such manner as is now prescribed for similar services in the Province within which the service is made; and the person charged with such service shall make his return thereof under oath, or, if a sheriff or bailiff in the Province of Quebec, may make such return under his oath of office.

Sec. 1.—A County court judge adjudicating a party insolvent is **SEC. 111.**  
*prima facie* evidence of his being a trader, (*McGuirk vs. McLeod*), 2  
 Pugs Ref. 323.

**112.** In case any person so served with a writ of *subpoena* or with an order to appear for examination, does not appear according to the exigency of such writ or process, the court or the judge on whose order or within the limits of whose territorial jurisdiction the same is issued, may, upon proof made of the service thereof, and of such default, if the person served therewith has his domicile within the limits of the Province within which such writ or process issued, constrain such person to appear and testify, and punish him for non-appearance or for not testifying in the same manner as if such person had been summoned as a witness before such court or judge in an ordinary suit ; and if the person so served and making default, has his domicile beyond the limits of the Province within which such writ or process issued, such court or judge may transmit a certificate of such default to any of Her Majesty's Superior courts of law or equity in that part of Canada in which the person so served resides, and the court to which such Certificate is sent, shall thereupon proceed against and punish such person so having made default, in like manner as it might have done if such person had neglected or refused to appear to a writ of *subpoena* or other similar process issued out of such last mentioned court ; and such certificate of default attested by the court, judge or Assignee before whom default was made, and copies of such writ or process and of the return of service thereof certified by the clerk of the court in which the order for transmission is made, shall be *prima facie* proof of such writ or process, service, return, and of such default.

**113.** No such certificate of default shall be so transmitted, nor shall any person be punished for neglect or refusal to attend for examination in obedience to any *subpoena* or other similar process, unless it be made to appear to the court or judge transmitting, and also to the court receiving such certificate, that a reasonable and

*Disobedience of  
writs and pro-  
cess, how pun-  
ishable.*

*Proof of de-  
fault.*

*Expenses must  
be tendered to  
person sum-  
moned as a wit-  
ness, &c.*

**SEC. 113.** sufficient sum of money, according to the rate *per diem* and per mile, allowed to witnesses by the law and practice of the superior courts of law within the jurisdiction of which such person was found, to defray the expenses of coming and attending to give evidence, and of returning from giving evidence, had been tendered to such person at the time when the writ of *subpœna*, or other similar process, was served upon him.

Forms under  
this act.

**114.** The forms appended to this Act, or other forms in equivalent terms, shall be used in the proceedings for which such forms are provided; and in every contestation of a claim, collocation or dividend, or of an application for a discharge, or for confirming or annulling a discharge, the facts upon which the contesting party relies shall be set forth in detail, with particulars of time, place and circumstance; and no evidence shall be received upon any fact not so set forth; but in every petition, application, motion, contestation or other pleading under this Act, the parties may state the facts upon which they rely, in plain and concise language, to the interpretation of which the rules of construction applicable to such language in the ordinary transactions of life shall apply.

Foreign dis-  
charges not to  
bar debts con-  
tracted in Ca-  
nada.

**115.** No plea or exception alleging or setting up any discharge or certificate of discharge, granted under the bankrupt or insolvent law of any country whatsoever beyond the limits of the Dominion, shall be a valid defence or bar to any action instituted in any court of competent jurisdiction in the Dominion, for the recovery of any debt or obligation contracted within such limits.

An adjudication in bankruptcy followed by an order of discharge in England has the effect of barring in the courts there any debt which the bankrupt may have contracted in any part of the world, (*Gill vs. Barron*, L. R.Q. P.C. 175; *Bank of Scotland vs. Stein*, 1 Ro. 462; *Edward vs. Ronald*, 1 Knapp P. C. 259; see *Odwin vs. Forbes*, Buck 57, for the goods of the bankrupt all the world over are vested in the trustee; and it would be a manifest injustice to take the property of a bankrupt in a foreign country and then to allow a foreign creditor to come to sue him here (in England), (*Arman vs. Castrique*, 13 M. & W. 447.)

But a foreign certificate is no answer to a demand in the English SEC. 115. courts, (*Armani vs. Castrique*, 13 M. & W. 447.) Lee 330.

**116.** The rules of procedure as to amendments of pleadings, which may be in force at any place where any proceedings under this Act are being carried on, shall apply to all proceedings under this Act ; and any court or judge, or Assignee, before whom any such proceedings are being carried on, shall have full power and authority to apply the appropriate rules as to amendments, to the proceedings so pending before him ; and no pleading or proceeding shall be void by reason of any irregularity or default which can or may be amended under the rules and practice of the court.

**117.** The death of the Insolvent, pending proceedings in liquidation, shall not affect such proceedings, or Provisioin in case of death of insolvent. impede the winding-up of his estate ; and his heirs or other legal representatives may continue the proceedings on his behalf to the procuring of a discharge, or of the confirmation thereof, or of both ; and the provisions of this Act shall apply to the heirs, administrators or other legal representatives of any deceased person who, if living, would be subject to its provisions, but only in their capacity as such heirs, administrators or representatives, without their being held to be liable for the debts of the deceased to any greater extent than they would have been if this Act had not been passed.

In case of a debtor dying leaving insufficient to pay his debts, execution creditors whose writs are in the sheriff's hands do not lose their priority ; nor does a creditor who has a sequestration in the hands of the sequestrators lose the advantage of it, (*Meyers v. Meyers*. 19 Chy, 185 Rob. & J. Dig., 430 v. 8, 97 ante.)

The death of the bankrupt after the Act of Bankruptcy, and the commencement of proceedings under this Act, but before the appointment of assignees, may occasion some curious results. For instance, if a bankrupt be seized or possessed of lands in joint tenancy his moiety of course passes to the assignees by their appointment, and they unquestionably hold as tenants in common with the person seized or possessed of the other moiety. But a question will arise as to whether the death of the bankrupt before

**SEC. 117.** the actual execution of the appointment of the assignees would have the effect of preventing survivorship.—Edgar 1869 and 134.

Costs: on what property and in what order chargeable.

**118.** The costs of the proceedings in Insolvency up to and inclusive of the notice of the appointment of the Assignee, shall be paid by privilege as a first charge upon the assets of the Insolvent; the disbursements necessary for winding-up the estate shall be the next charge on the property chargeable with any mortgage, hypothec or lien, and upon the unincumbered assets of the estate respectively, in such proportions as may be justified by the nature of such disbursements, and their relation to the property as being incumbered or not, as the case may be; and the remuneration of the Assignee and the costs of the judgment of confirmation of the discharge of the Insolvent, except when such confirmation is upon a deed of composition, or of the discharge if obtained direct from the court, and the costs of the discharge of the Assignee being first taxed by the proper taxing officer at the tariff rate, or, if there be no tariff, at the same rate as is usual for uncontested proceedings of a similar character, after notice to the Inspectors, or to at least three creditors, shall also be paid therefrom as the last privileged charge thereon. But no portion of the assets or property chargeable with any mortgage, hypothec or lien for any claim not provable on the estate shall be liable for any other but their proportion of costs necessarily incurred in realizing such assets and property, except what may remain after payment of such mortgage or lien.

As to assets chargeable with mortgages &c.

The last sentence of this section is new and is a valuable addition to the rights of mortgagees and hypothecary creditors.

Provision as to letters addressed to insolvent.

**119.** The judge shall have the power, upon special cause being shewn before him under oath for so doing, to order any postmaster at the place of residence or at the place of business of the Insolvent to deliver letters addressed to him at such post office to the Assignee, and to authorize the Assignee to open such letters in the presence of the prothonotary or clerk of the court of which such judge is a member, and in the presence of the Insolvent or after notice given to him by letter

through the post, if he be within the Province; and if SEC. 119. such letters be upon the business of the estate the Assignee shall retain them, giving communication of them, however, to the Insolvent on request; and if they be not on the business of the estate they shall be resealed, endorsed as having been opened by the Assignee, and given to the Insolvent or returned to the post office; and a memorandum in writing of the doings of the Assignee in respect of such letters, shall be made and signed by him and by the prothonotary or clerk, and deposited in the court.

See sec. 85 of the English Act of 1869, which goes further, and authorizes an order to the postmaster to redirect to the trustee all letters addressed to the bankrupt.

**120.** All causes of disqualification applying to a judge Disqualification of Judge in civil matters in the several Provinces to which this Act applies, shall be causes of disqualification and recusation under this Act, as regards the final hearing and determination of any matter subject to appeal or revision under this Act: but such grounds of disqualification shall not apply to mere ministerial acts or incidental proceedings; and such causes of disqualification shall be tried as provided for by the laws in force in the several Provinces where the proceedings are pending. If a judge be disqualified or incompetent to act in any matter What Judge to act in such case. in insolvency under this section, the judge competent to act in matters of insolvency in a county or district adjoining that in which the proceedings are pending (or in the case of a Judge of the Court of Probate in Nova Scotia, the judge of the said court in an adjoining county) and who is not disqualified under this section, shall be the judge who shall have jurisdiction in such matter, in the place of the judge so qualified.

For grounds of recusation in Quebec v. arts 176 *et seq.* C. C. P. of that Province and 34 Vic. c. 25, 89.

**121.** In the absence of the judge from the chief place Prothonotary to preside [in Quebec] in absence of judge. of any district in the Province of Quebec, the prothonotary of the court shall preside at the meetings of creditors called to take place before the judge, and shall take

**SEC. 121.** minutes of the proceedings at the same, and shall in such cases as well as in all others, make any order which the judge is empowered to make; but the same shall not be delivered nor put into execution if any objection to it is filed with the prothonotary, the same day or the next after, and then the whole matter and all the papers and proceedings, produced and had at such meeting shall be referred to the judge, who shall adjudicate upon the same, confirming the order made by the prothonotary, or making such other as he may think best in the case.

This section is new and will no doubt be found of much use in facilitating proceedings and preventing unnecessary delays.

*Rules of practice and tariff of fees in the province of Quebec: how to be made.*

**122.** In the Province of Quebec, rules of practice for regulating the due conduct of proceedings under this Act, before the court or judge, and tariffs of fees for the officers of the court and for the advocates and attorneys practising in relation to such proceedings, or for any service performed or work done for which costs are allowed by this Act, (but the amount whereof is not hereby fixed,) shall be made forthwith after the passing of this Act, and when necessary repealed or amended, and shall be promulgated under or by the same authority and in the same manner as the rules of practice and tariff of fees of the Superior Court, and shall apply in the same manner, and have the same effect in respect of proceedings under this Act as the rules of practice and tariff of fees of Superior Court apply to and affect proceedings before that Court; and bills of costs upon proceedings under this Act may be taxed and proceeded upon in like manner as bills of costs may now be taxed and proceeded upon in the said Superior Court.

*And in the other provinces.*

**123.** In the Province of Ontario the judges of the Superior Courts of common law, and of the Court of Chancery, or any five of them, of whom the Chief Justice of the Province of Ontario, or the Chancellor, or the Chief Justice of the Common Pleas, shall be one,—in the Province of New Brunswick, the Judges of the Supreme Court of New Brunswick, or majority of them,—in the Province of Nova Scotia, the Judges of the Su-

preme Court of Nova Scotia, or the majority of them,—in SEC. 123. the Province of British Columbia the Judges of the Supreme Court, or the majority of them,—in the Province of Prince Edward Island, the Judges of the Supreme Court, or the majority of them,—and in the Province of Manitoba, the Judges of the Court of Queen's Bench, or a majority of them,—shall forthwith make and frame and settle the forms, rules and regulations, to be followed and observed in the said Provinces respectively, in proceedings in insolvency under this Act, and shall fix and settle the costs, fees and charges which shall or may be had, taken or paid in all such cases by or to attorneys, solicitors, counsel, and officers of courts, whether for the officer or for the Crown as a fee for the fee fund or otherwise, and by or to sheriffs, Assignees or other persons whom it may be necessary to provide for, or for any service performed or work done for which costs are allowed by this Act, but the amount whereof is not hereby fixed.

See the remarks of Mr. Edgar, on section 139 of the Act of 1869.

**124.** Until such rules of practice and tariff of fees <sup>Present rules, &c., to remain until altered.</sup> have been made, as required by the two preceding sections, the rules of practice and tariff of fees of insolvency, now in force in the said Provinces respectively, shall continue and remain in full force and effect.

**125.** Every Assignee shall be subject to the summary jurisdiction of the court or judge in the same manner and to the same extent as the ordinary officers of the court are subject to its jurisdiction; and the performance of his duties may be compelled, and all remedies sought or demanded for enforcing any claim for a debt privilege, mortgage, hypothec, lien or right of property upon, in or to any effects or property in the hands, possession or custody of an Assignee, may be obtained by an order of the judge on summary petition in vacation, or of the court on a rule in term, and not by any suit, attachment, opposition, seizure or other proceeding of any kind whatever; and obedience by the Assignee to such order may be enforced by such court or judge under <sup>Obedience, how enforced.</sup> the penalty of imprisonment, as for contempt of court or

**SEC. 125.** disobedience thereto, or he may, if not an Official Assignee, be removed in the discretion of the court or judge,

See notes to s.s. 28 and 29 *ante*.

A demand for wages was made as a preferred claim to an assignee. The creditors at a meeting passed a resolution authorizing the assignee to pay all claims for wages, but the Assignee refused payment of this claim as made. At this time no dividend sheet had been prepared.

**Power of judge over assignee.**

A summons was subsequently issued by the County judge, calling on the Assignee to shew cause why he should not pay the claim, and the Assignee not appearing, evidence was taken before the judge, and an order made for the payment forthwith, with costs, of a sum less than the original demand. The Assignee afterwards paid the claim as reduced, but refused to pay any costs; upon which the Judge's order was made a rule of court, and execution issued thereupon against the goods of the Assignee. Upon his application for a writ of prohibition to prohibit further proceedings on the writs or orders &c.:—Held 1. That the Assignee should not have been ordered, so far as appeared, to pay costs: 2. That the power given to the judge by S. 4 sub. S. 16 of the Act of 1864 to control the Assignee, is in the nature of giving him personal directions as to his duties, enforceable by imprisonment on default, but that the judge has no power to enforce his orders by judgment and execution, though he might possibly compel an Assignee to pay costs incurred by his disobedience, by making it a condition that he should pay them before he could be considered purged of his contempt, and that the only remedy of the Assignee was to apply for a prohibition, (*In re Cleghorn, and the Judge of the County of Elgin and Munn.* 2 L. J. (N. S.) 133. C. L. Chamb Richards, Rob & J. p. 419.

An action *en Revendication* claiming property from an Assignee under the Act will be dismissed on demurrer, (*Larocque v. Lajoie*, 17 L. C. Jurist, p. 41.)

See Moritz & Whyte, G. B. Montreal, 1870

An action in ejectment may be sued out in ordinary form against an assignee, *The Fraser Institute v. Moore*, S. C. Montreal 1875, 19 L. C. Jurist, p. 133.

The Act of 1864, sec. 4, sub-sec. 16, defined the duties, the performance of which may be thus enforced, to be—“Whether imposed by the deed of assignment, by instructions from the creditors validly passed by them under this Act and communicated to him, or by the terms of this Act.”

If a demand to assign has been made by a creditor but upon his claim being satisfied he dropped further proceedings, nevertheless the estate becomes subject to compulsory liquidation as the demand made

*“From the assigneeship of the estate.”*

oy him accrues to the benefit of the other creditors although his **SEC. 125.**  
 own claim has been satisfied, (*Dever v. Morris*, Hil. T. 1872.)

A creditor whose claim has not matured may make the affidavits and take the other steps necessary to make the estate subject to compulsory liquidation, (*In re Park*, 2 Hannay's Rep. 121.)

**126.** In the province of Quebec every trader having a marriage contract with his wife, by which he gives or promises to give or pay or cause to be paid, any right, thing, or sum of money, shall enregister the same, if it be not already enregistered, within three months from the execution thereof; and every person not a trader, but hereafter becoming a trader, and having such a contract of marriage with his wife, shall cause such contract to be enregistered as aforesaid (if it be not previously thereto enregistered,) within thirty days from becoming such trader ; and in default of such registration the wife shall not be permitted to avail herself of its provisions in any claim upon the estate of such Insolvent for any advantage conferred upon or promised to her by its terms ; nor shall she be deprived by reason of its provisions of any advantage or right upon the estate of her husband, to which, in the absence of any such contract, she would have been entitled by law ; but this section shall be held to be only a continuance of the second sub-section of section twelve of the "*Insolvent Act of 1864*," and of section one hundred and forty of the "*Insolvent Act of 1869*," and shall not relieve any person from the consequence of any negligence in the observance of the provisions of the said sub-section or section.

This prohibits the wife from claiming on the estate of the husband, under a marriage contract which has not been enregistered within the prescribed delay, but does not prevent her from holding property, when she is separated as to property (*séparée de biens*) from her husband, by such contract, or by a judgment of the Court.

On the other hand she is not to be deprived of any right upon the estate of her husband. For instance, if she would otherwise have accepted by the contract the promise of a sum of money from her husband, in lieu of dower, she would be unable to claim it in the event of his insolvency, but might insist upon her dower under the common law. P.op. 164.

Registration of  
marriage con-  
tracts of traders  
in Quebec.

## SEC. 127.

## IMPRISONMENT FOR DEBT.

**Insolvent in gaol or in the limits may apply to judge for discharge.**

**Proceedings hereon.**

**127.** Any debtor confined in gaol or on the limits in any civil suit, who may have made the assignment provided for in this Act, or against whom process for liquidation under this Act may have been issued, may, at any time after the meeting of creditors provided for in this Act, make application to the judge of the county or district in which his domicile may be or in which the gaol may be in which he is confined, for his discharge from imprisonment or confinement in such suit; and thereupon such judge may grant an order in writing, directing the sheriff or gaoler to bring the debtor before him for examination at such time and place in such county or district as may be thought fit; and the said sheriff or gaoler shall duly obey such order, and shall not be liable to any action for escape in consequence thereof, or to any action for escape of the said debtor from his custody, unless the same shall have happened through his default or negligence; or if the debtor is confined in the county or district in which the judge does not reside, the judge instead of ordering the debtor to be brought before him for examination may, if he sees fit, make an order authorizing and directing the Official Assignee for the county or district in which the debtor is confined, to take such examination, and it shall be the duty of the Official Assignee to take down or cause to be taken down such examination fully in writing and transmit the same under his hand forthwith to the judge; and the Official Assignee shall be entitled to ten cents for each folio of one hundred words of such examination.

**Examination of insolvent and witnesses.**

**Judge may discharge him if the examination be satisfactory.**

(1.) In pursuance of such order the said confined debtor and any witnesses subpoenaed to attend and give evidence at such examination may be examined on oath at the time and place specified in such order before such judge or Assignee; and if on such examination it appears to the satisfaction of the judge that the said debtor has *bona fide* made an assignment as required by this Act, and has not been guilty of any fraudulent disposal, concealment or retention of his estate or any part thereof,

or of his books and accounts or any material portion thereof, or otherwise in any way contravened the provisions of this Act, such judge shall, by his order in writing, discharge the debtor from confinement or imprisonment ; and on production of the order to the sheriff or gaoler, the debtor shall be forthwith discharged without payment of any gaol fees : Provided always, that no such order shall be made in any case unless it be made to appear to the satisfaction of such judge that at least seven days' notice of the time and place of the said examination had been previously given to the plaintiff in the suit in which the debtor was imprisoned, or to his attorney and to the Assignee for the time being.

(2.) The minutes of the examination herein mentioned shall be filed in the office of the clerk of the court out of which the process issues, and a copy thereof shall be delivered to the Assignee ; and if, during the examination or before any order be made, the Official Assignee or the appointed Assignee, or the creditor, or any one of the creditors, at whose suit or suits the debtor is in custody makes affidavit that he has reason to believe that the debtor has not made a full disclosure in the matters under examination, the judge may grant a postponement of such examination for a period of not less than seven days nor more than fourteen days, unless the parties consent to an earlier day.

3.) After such examination, in case of any subsequent arrest in any civil suit, as aforesaid, for causes of action arising previous to the assignment or process for liquidation, the said debtor may, pending further proceedings against him under this Act, be forthwith discharged from confinement or imprisonment in such suit, on application to any judge, and on producing such previous discharge : Provided that nothing in this section contained shall interfere with the imprisonment of the said debtor, in pursuance of any of the provisions of this Act.

The following remarks of Mr. Edgar on the similar section (145) of the Act of 1869 apply with equal force to this section, and it is to be regretted that attention has not been paid to his suggestion.

**Sec. 127.** The English Act of 1849, sec. 112 (not repealed by Act of 1861), provided for the bankrupt's protection and discharge from custody, except in cases of imprisonment for any debt contracted by fraud or breach of trust, or for breach of the revenue laws, or in any action for breach of promise of marriage, seduction, and several other descriptions of action. These clauses go much further than the English, and provide that a debtor confined in gaol, or on the limits, in *any civil suit*, may be brought before the court, and if he has made an assignment and does not appear to have been guilty of having contravened the provisions of this Act, the Judge shall discharge him. No objection can be taken to the application for discharge according to the terms of the clause, even on the ground that the imprisonment is in an action for a debt contracted by fraud or breach of trust. It certainly seems unreasonable, if such be the true construction of the Act, that a defendant held, for example, under a writ of capias on a claim for damages in an action for seduction, should be enabled to obtain his discharge from custody by simply making an assignment under this Act. By reference to section 100, *ante*, it will be seen that a discharge in insolvency does not release the insolvent from a debt due as damages in an action for seduction. Why, then, should he be enabled to abscond, and defeat the plaintiff, by simply making a voluntary assignment when he is put into gaol? If it is impossible to construe these clauses in such a way as to prevent the release from custody, where the debt for which the insolvent is imprisoned falls under the class of debts from which he is not relieved by a discharge in insolvency, the prompt interference of the legislature is necessary.

The evil pointed out by Mr. Edgar was actually experienced in the case of *ex parte* McMinn, Montreal, 1874, where the insolvent was ordered to be discharged from custody though under arrest on charges of fraud and breach of trust.

#### APPEAL.

**Appeal from  
any order of  
Judge in pro-  
vince of Que-  
bec.**

**128.** In the Province of Quebec all decisions by a Judge in Chambers in matters of insolvency shall be considered as judgments of the Superior Court, and any final order or judgment rendered by such judge or court may be inscribed for revision or may be appealed from by the parties aggrieved in the same manner as they might inscribe for revision or appeal from a final judgment of the Superior Court in ordinary cases, under the laws in force when such decision shall be rendered. If

any of the parties to any contestation, matter or thing, SEC. 128. upon which a judge has made any final order or judgment, are dissatisfied with such order or judgment, they may, in the Province of Ontario, appeal therefrom to either of the superior courts of common law or to the Court of Chancery, or to any one of the judges of the said courts; in the Province of New Brunswick to the Supreme Court of New Brunswick, or to any one of the judges of the said court; in the Province of Nova Scotia to the Supreme Court of Nova Scotia or to any one of the judges of the said court; in the Province of British Columbia to the Supreme Court of that Province, or to any judge of the said court; in the Province of Prince Edward Island to the Supreme Court of Judicature, or to any judge of the said court; in the Province of Manitoba, to the Court of Queen's Bench or to any judge of the said court; but any appeal to a single judge in the Provinces of Ontario, New Brunswick, Nova Scotia, British Columbia, Prince Edward Island, or Manitoba, may, in his discretion, be referred, on a special case to be settled, to the full Court, and on such terms in the meantime as he may think necessary and just. No such appeal or proceeding in revision shall be entertained unless the appellant or party inscribing for revision shall have, within eight days from the rendering of such final order or judgment, adopted proceedings on the said appeal or revision or unless he shall within the said delay have made a deposit or given sufficient sureties before a Judge that he will duly prosecute the said appeal or proceedings in revision, and pay such damages and costs as may be awarded to the respondent. If the party appellant does not proceed with his appeal, or in review, as the case may be, according to the law or the rules of practice, the court, on application of the respondent, may order the record to be returned to the officer entitled to the custody thereof and condemn the appellant to pay the respondent the costs by him incurred.

Notice of application for allowance of an appeal must be served within eight days from the day on which the judgment appealed

*Appeal to be  
prosecuted  
within eight  
days.*

*If appellant  
does not pro-  
ceed.*

**SEC. 128.** from is pronounced, but the application itself may be after the eight days. (*Re Ownes*, 12 Chy. 446. Rob. & J. Dig. 449).

**Appeal.** Where the notice was served in time, but named a day for the application which did not give the time the insolvent was entitled to, and was irregular in some other respects, the notice was held amenable. *Ib.*

The sureties under this clause cannot be the solicitors for the appellants ; the rule in the other courts is to be followed, (*Re Ownes*, 12 Grant, 564 ; and see *Panton v. Labertouche*, 1 Ph. 265 ; *Meyers v. Hutchinson*, 2 U. C. Prac. 380.) The proper time to take objection to the sufficiency of the sureties is before the judge of the Insolvent Court, by analogy to proceedings in appeals from the county to the superior courts, (Con. Stats. U. C., ch. 15, sec. 67, and *in re Ownes*, *ubi supra*).

**Reservation of amount of dividend contested.** **129.** Pending the contestation of any claim or of a dividend sheet and of any appeal or proceeding in revision, the Assignee shall reserve a dividend equal to the amount of the dividends claimed or contested.

#### FRAUDS AND FRAUDULENT PREFERENCES.

**Gratuitous contracts within three months of insolvency presumed fraudulent.** **130.** All gratuitous contracts or conveyances, or contracts without consideration, or with a merely nominal consideration, respecting either real or personal estate, made by a debtor afterwards becoming an Insolvent, with or to any person whomsoever, whether such person be his creditor or not, within three months next preceding the date of a demand of an assignment or for the issue of a writ of attachment under this Act whenever such demand shall have been followed by an assignment or by the issue of such writ of attachment, or at any time afterwards, and all contracts by which creditors are injured, obstructed or delayed, made by a debtor unable to meet his engagements, and afterwards becoming an Insolvent, with a person knowing such inability or having probable cause for believing such inability to exist, or after such inability is public and notorious, whether such person be his creditor or not, are presumed to be made with intent to defraud his creditors.

In all civilized countries a creditor has a right to annul gratuitous and fraudulent contracts, affecting his interests.

Under the Civil law, in Rome, this action existed, by the name of SEC. 130. *act. pauliane.* “*Ait ergo prætor, quæ fraudationis causæ gesta erunt.* <sup>Gratuitous and</sup> *Hœc verba sunt generalia et continent in se omnem omnino in fraudem* <sup>fraudulent</sup> *contracta.* “*factam vel alienationem, vel quem cumque contractum.*” *L 1 § 2 ff. que in fraud. credi.* The code and digest have each a title upon the development of this action.

In France, anterior to the Code Napoleon (Ord. 1673, tit. 11, art. 4) all donations, transfers, and sales, of real or personal property, <sup>Law of France on subject.</sup> made in fraud of creditors, were null, without reference as to the time when such transactions may have taken place. In 1702, a declaration was made, to the effect that, if the transaction was made within ten days of the failure, no proof of fraud was necessary to annul it; beyond that period, it might be annulled on proof of fraudulent intent.

By the Code de Commerce all donations, transfers, and payments of immature debts, ten days anterior to the insolvency, were absolutely null; and by the new code of May, 1838, all these transactions were declared absolutely null if made within ten days next before the time established by the Court as that of the stoppage of payment. Namur Droit Comm. § 149, p. 446. And all other transactions made after such stoppage, were annullable if the party contracting with the debtor knew of such stoppage.

In Holland we think a wiser discrimination is exercised in such cases. There, all donations are void, when made within six days of declaration of insolvency by the debtor, or, of the filing of the petition by the creditors for compulsory liquidation; or within one hundred and twenty days, if made with a relative within the fourth degree; and all payments of immature debts, and all hypothecs, and security given for debts, are void, if made within forty days of any of the above acts of insolvency. Levesque, Faillites et Banqueroutes, No. 612.

In Scotland the rule is similar to that prevailing in the Civil law <sup>of Scotland.</sup> and in France. Kinnear, Bank, 133 *et seq.*

In England, all such acts of the debtor are declared null, when <sup>of England.</sup> made “in contemplation of bankruptcy,” (*Doria & Macrae, Bank.* 138, see also *Lee* 392 on sec. 92 of Act of 1869.) This expression is not limited to mean contemplation of a commission of bankruptcy; it is enough, if we knew, or should be supposed to anticipate that bankruptcy would, in all human probability, follow, though not immediately, (*Gibbons vs. Phillips*, 7 B. & C. 529.) The principle of the bankrupt law there is identical with that of our own, namely, the equal distribution of the property and effects of the debtor. All

**SEC. 130.** acts done with the object of preventing that distribution are therefore reputed fraudulent. Kerr, Fraud, 219.

The decisions of English courts upon frauds and fraudulent conveyances, and which are applicable, or nearly so, to the provisions of this Act, will be found collated in *Doria & Macrae*, Bank. 136 *et seq.*; Arch. Bank. 54 *et seq.*; James, Bank. Law, U. S. 1867, 236. Among the French authorities bearing on this question, are: Chardon, du Dol. chap. 2, No. 193 *et seq.*; Bedarride, Faillites et Banq.; 2 Namur, Droit Comml. Liv. 3, tit. 1, § 149 *et seq.*; 3 Nouv Denisart, v. Fraude aux Creanciers § 1, No. 10; Pothier, Ob. Part 1, chap. 2, art. 2, No. 153; 6 Toullier, Nos. 353 *et seq.*

**Contracts, &c., with a merely nominal consideration.**

The question as to what constitutes a "nominal consideration" must be decided by the circumstances of each case. There are occasions when merchants may sell a certain class of articles at a nominal price, for the purpose of promoting the sale of other goods in their possession, or to procure money for the purchase of other goods, and realizing by the profit or the sale of the latter more than the loss on the former. It is not to be presumed that if a debtor should fail to realize this expectation, a purchaser, in good faith, should be compelled to restore what he may have purchased under such circumstances. In England it is held, that "if a trader sells goods at less price than they are worth, and make a "practice of it, though it is obvious that such practice must ultimately end in bankruptcy, no such sale, *qua* sale, will constitute an "act of bankruptcy; and even where the trader intended in a particular sale to run away with the fruits and cheat his creditors, "such sale is not an act of bankruptcy. But if the purchaser be "privy to that intention, it would be a fraudulent transfer, within "the statute." (*Doria & Macrae*, 153 Kerr, Fraud, 222). A sale of goods, "considerably less than their market value," is not *per se* a fraudulent transfer, unless it be shewn to be with intent to delay or defeat creditors, (*Lee vs. Hart*, 10 Exch. Rep. 555).

In France, and in Quebec, the right has existed—taken from the civil law—to annul a sale of real estate, if the price given was less than half its value. The inequality was deemed *lesio*, and relief was afforded. But in the former country this privilege has been restricted (Code Nap. 1313); and in the latter it has been recently limited to minors, and majors can no longer annul a contract for cause of lesion only. Civ. Code L. C. art. 1012. It may be thus argued, that courts will interpret the words "merely nominal consideration," to mean a price so far below the actual value of the goods sold, as to appear a cloak to hide a gift, or fraud. If the pur-

chaser be a creditor or a relative, there would be then an appearance of fraud, which would warrant a stricter application of the statute. SEC. 130.  
Popham, p. 111.

A gratuitous transfer of a debt within thirty days cannot be used in set-off. See notes to section 107 *ante*.

**131.** A contract or conveyance for consideration, respecting either real or personal estate, by which creditors are injured or obstructed, made by a debtor unable to meet his engagements with a person ignorant of such inability, whether such person be his creditor or not, and before such inability has become public and notorious, but within thirty days next before a demand of an assignment or the issue of a writ of attachment under this Act, or at any time afterwards, whenever such demand shall have been followed by an assignment or by the issue of such writ of attachment, is violable, and may be set aside by any court of competent jurisdiction, upon such terms as to the protection of such person from actual loss or liability by reason of such contract, as the court may order.

Mere insolvency is not of itself a sufficient cause for setting aside a mortgage granted whilst the debtor was in that state, without proof either that such insolvency was notorious, or that there was really fraudulent collusion between the debtor and creditor, (*Warren et Shaw*, C. R. 12 L. C. J. P. 309. 1866.)

Payment made by a debtor to obtain his liberation from arrest under a *capias* is not void though made within thirty days of his assignment unless the creditor knew or had reasonable cause to believe that his debtor was insolvent, (*Sauvageau vs. Larivière*, 14 L. C. J. P. 139; 2 R. L. P. 186. 1870).

On the 21st Sept., 1866, S transferred a lot of goods to K, by delivery of the warehouse receipts therefor. S became insolvent on the 19th Oct. following, and on the following day K became aware of it. On the 22nd Oct. K executed a mortgage on the goods to a Bank :—Held, that K had a right to so dispose of the property. There being no evidence of obstructing or injuring creditors, and the property having been disposed of for value, the case was held not to fall within this section, but even if it had, the original contract was not void, but voidable only, and would only be cancelled upon affording protection from actual loss, (*The Bank of Montreal vs. McWhirter*, 17 C. P. U. C. 506).

Fraudulent contracts.

Certain other contracts voidable.

Mere insolvency not sufficient to set aside deed.

Payment to obtain release from capias.

Mortgage of goods after knowledge of insolvency.

**SEC. 131.** In consideration of the apparent good faith of the purchaser, through the payment of consideration and ignorance of the debtor's condition, the contracts specified in this section are not absolutely void, but voidable only, and may be rescinded only upon such terms as will protect him from loss.

**Mortgage in consideration of further advances.** In Ontario it has been held, under the Act of 1864, which contained provisions identical to those in the present Act, respecting fraudulent preferences, that though a person who transacts with the debtor may have apprehended the early insolvency of the latter, a mortgage given under such circumstance, for money lent, to enable the debtor to carry on his business, and to pay his liabilities in full, should be held valid as against the official assignee, (*Newton vs. Ontario Bank*, 15 Chy. Rep. 283).

**Contracts made with intent to defraud creditors to be void.** **132.** All contracts, or conveyances made and acts done by a debtor, respecting either real or personal estate, with intent fraudulently to impede, obstruct or delay his creditors in their remedies against him, or with intent to defraud his creditors, or any of them, and so made, done and intended with the knowledge of the person contracting or acting with the debtor, whether such person be his creditor or not, and which have the effect of impeding, obstructing, or delaying the creditors of their remedies, or of injuring them or any of them, are prohibited and are null and void, notwithstanding that such contracts, conveyances, or acts be in consideration, or in contemplation of marriage.

See notes to previous and succeeding sections.

**Assignment as security for money to pay debts.** An assignment by a trader of all his property, as security for an advance of money which he afterwards applies in payment of existing debts, is not necessarily fraudulent within the meaning of the Bankruptcy Acts. In order to make such an assignment fraudulent, the lender must be aware that the borrower's object was to defeat or delay his creditors. Such an assignment cannot be an act of bankruptcy unless it is also void as being fraudulent, (*in re Colewre*, 1 L. R. Chy. 128; and see *Mercer vs. Peterson*, 2 L. R. Ex. 304 affirmed, 3 L. R. Ex., ch. 105).

**Secret promise to pay in full.** On a bill by a bankrupt, who had compounded with his creditors for eight shillings in the pound, and where bankruptcy had been annulled, the court set aside with costs, a secret bargain whereby the bankrupt agreed to pay one creditor in full, in consideration of

his becoming surety for payment of the composition, (*Wood vs. Barker*, 1 L. R. Eq. 139; following *Jackman vs. Mitchell*, 13 Ves. 581). SEC. 132.

Fraudulent contracts.

A mortgagor in embarrassed circumstances, in May 1864, conveyed his equity of redemption in the mortgaged property, under pressure, to the mortgagee for a sum considerably less than its value, and in June following he was on his own petition adjudicated a bankrupt. On a bill filed by the assignee the deed was set aside. (*Ford vs. Olden*, 3 L. R. Eq. 461.) Conveyance of equity of redemption.

Questions will be likely to arise as to property given to a man, determinable in the event of his bankruptcy. A settlement of property to a man until he becomes bankrupt, and then over to his wife and children, has been held to be void so far only as it related to the property of the husband, it being considered as a fraud upon the bankrupt laws; but it would be valid as far as it related to the property of the wife, (*Lester vs. Garland*, 5 Sima. 295; Mon. 471). The construction of such provisions in wills or settlements depends entirely upon the exact nature and form of the trust or condition annexed to the bequest. The intention to prevent the property passing to the donee's assignees has frequently been frustrated by the erroneous way in which the instrument attempting to carry out such intention has been drawn. There seems to be nothing to prevent the creation of such a limitation or condition to an estate, as that it shall cease and be forfeited, and the interest pass to the bankrupt's wife and children, in the event of bankruptcy; but the object may be endangered by any attempt to combine with such limitation or condition a stipulation for maintenance, or any direct personal benefit continuing for the bankrupt, (see *Tyrell vs. Hope*, 2 Atk. 558; and *Lester v. Garland*, *ubi supra*). Property determinable by bankruptcy.

In Quebec bequests and legacies may be made unattachable, and as a consequence it would seem may be secured from passing to the insolvent's creditors.

Whatever interest the husband has by law in his wife's property, and has the power to dispose of, will pass to his assignees, (see Com. Dig. Bankrupt, D. 12; *Mace vs. Cadell*, Cowp. 232). The assignees of a husband in England are not allowed to reduce any of his wife's estate into possession in equity, without making a reasonable settlement upon the wife, (see *Rankin vs. Barnard*, 5 Mad. 32; and Story's Eq. Juris. § 1412); but, as by our Married Women's Act, the husband is deprived of all right to reduce his wife's estate into possession, his assignees can claim no such power, even upon terms of making a settlement upon her.

**SEC. 132.** A person in insolvent circumstances conveyed by way of settlement to his intended wife a lot of land, on which the settler had commenced to put up a house, but which was not completed till after marriage. On a bill filed by the assignees in insolvency, the court declared that for so much of the building as was completed after marriage, the creditors had a claim on the property; but gave the wife the right to elect whether she would be paid the value of her interest without the expenditure after marriage or pay to the assignees the amount of such expenditure; and it subsequently appearing that her husband had created a mortgage prior to the settlement the wife was declared entitled to have the value of the improvements made after marriage applied in discharge of the mortgage in priority to the claims of the creditors, (*Jackson vs. Bowman*, 14 Grant, 156; 1 Edgar 102).

**Interpretation  
in England of  
similar clauses.**

The interpretation given to these words and their equivalents, in the English courts, may be gathered from the following illustrations:—Any conveyance which has the effect of defeating or delaying creditors, no matter what the motive may be, for such conveyance must be taken to have been made with such intent, is therefore fraudulent. (*Stewart v. Moody*, 1 C. M. & R. 777; *Graham v. Chapman*, 12 C. B. Rep. 85,) as for instance a conveyance of a debtor's stock to secure an antecedent debt, or previous advances, even though the expectation of a further advance may have been the cause of the transfer. *Ibid.* The reason is, that the debtor gets no equivalent for the stock, (*Lindon v. Sharp*, 7 Scott N. R. 745; *Oriental Bank v. Coleman*, 4 L. T. Rep. N. S. 9.) The creditors are fraudulently delayed and impeded when the contract or conveyance prevents the continuance of trade by the debtor, *ex parte Bailey, Doria & Macrae*, 139. What grant or conveyance by a debtor, as will not disable him from trading, but may still be regarded as an act of bankruptcy, must be determined by the particular circumstances of each case, (*Young v. Wand*, 8 Exch. Rep. 221). On the other hand, many grants and conveyances, made by a trader for the satisfaction of part of his debts, are valid, even though a preference be consequently obtained, provided they are made to preserve his credit, and not with a view to give a preference where credit can be no longer preserved, (*Harman v. Fletcher*, Cowp. 117; *Compton v. Bedford*, 1 W. Bl. Rep. 322).

**French authorities.** For the French authorities on this point, see Ord. 1673, tit. 11, art. 4, Declaration de 1702.

If the person with whom the debtor contracts be ignorant of his financial condition, the contract or conveyance will be valid if made

upon a consideration, or if the insolvency be not notorious, (Bedarride, du Dol, No. 1432. Jousse, Ord. 1673, tit. 11, art. 4.) SEC. 132.

In Ontario it is held that actual knowledge, not mere constructive notice, is necessary to vitiate under this clause. (*Leys & wife vs. McPherson*, 17 C. P. Rep. 266). Under that, the case of Davis & al. v. Muir, and Chamberlin contesting, has been recently decided in the Superior Court at Montreal. It is of sufficient interest to be reproduced somewhat fully.

About the month of June, 1867, the insolvents, Davis, Welsh & Co., obtained from James Muir his accommodation notes in their favor, for \$12,000.00.

About the 10th January, 1868, James Muir, hearing that they had suspended payment, obtained their notes, and caused them to be ante-dated, and made to correspond, as regards the dates and amounts, to the accommodation notes. Davis, Welsh & Co. made an assignment under the Act about ten days after.

One of these notes was then transferred by him, but without recourse, to the claimant, E. Muir, a creditor of James Muir, who took it as a security for an antecedent debt, but before its apparent maturity, and without any positive knowledge of the foregoing details.

Shortly after this transfer by James Muir to E. Muir, the former also became insolvent. Under these circumstances E. Muir, as the holder of the note, being, as stated, one of those got by James Muir from D. W. & Co. in January, 1868, and holding it as collateral security, without recourse (*sans recours*), did not rank on James Muir's estate, but claimed on the estate of the insolvents as the makers. Their right thus to rank was contested, on the ground, chiefly,—1st, that the note was given in violation of the corresponding section of the Act of 1864, and was therefore absolutely void, *ab initio*, even if E. Muir were a *bona fide* holder for value before maturity; and 2ndly, on the ground that E. Muir having taken it for an antecedent debt, without incurring any new obligation on the strength of it, was not in fact a holder for value as against D. W. & Co.'s creditors.

The assignee to the estate sustained the contestation on both these grounds, and on appeal to the Superior Court, Torrance J., confirmed the judgment, resting his decision on the first ground, as alone sufficient without adverting to any other. He held it was an attempt to create a security upon the estate of persons at the time insolvent, and that the prohibition pronounced was an absolute prohibition, which rendered null the note, no matter whose hands it was.

Fraudulent contracts.

Actual knowledge necessary.

**SEC. 132.** It is thus decided that a promissory note, given in violation of this sec. of the Act, is absolutely null, *ab initio*, even in the hands of a third party, an innocent holder before maturity. See 13 L. C. Jur. 184. Popham, p. 115.

Fraudulent  
preferential  
sales, &c., to be  
void.

Presumption of  
fraud.

**133.** If any sale, deposit, pledge or transfer be made of any property, real or personal, by any person in contemplation of insolvency, by way of security for payment to any creditor; or if any property, real or personal, movable or immovable, goods, effects, or valuable security, be given by way of payment by such person, to any creditor whereby such creditor obtains or will obtain an unjust preference over the other creditors, such sale, deposit, pledge, transfer or payment shall be null and void, and the subject thereof may be recovered back for the benefit of the estate by the Assignee, in any court of competent jurisdiction; and if the same be made within thirty days next before a demand of an assignment, or for the issue of a writ of attachment under this Act, or at any time afterwards, whenever such demand shall have been followed by an assignment or by the issue of such writ of attachment, it shall be presumed to have been so made in contemplation of insolvency.

Advertisement  
by sheriff suffi-  
cient notice to  
the public.

After the advertisement of the Sheriff that a writ of attachment in insolvency has issued, the public is bound to know the incapacity of the insolvent to sell any of his property, and this state of things continues during the pendency of an appeal from a judgment which quashed the attachment; and the sale by the insolvent of any property under such circumstances, although the property be not actually seized, in consequence of its having been secreted, is absolutely null and not annulable only: and the guardian to the attachment under the writ can revindicate such property, when so sold, in the hands of the purchaser, who will not be allowed to claim reimbursement of his purchase money, (*Mallette & Whyte*, G. B., 12 L. C. J., p. 229. 1868).

Preference un-  
der pressure not  
void.

A preference which a debtor is induced to give by threats of criminal or other proceedings is not void under the Indigent Debtor's Act of 1859 or the Insolvent Act of 1864, (*Clemmon vs. Converse*, 16 Chy. 547. See also *McPherson vs. Reynolds*, 6. C. P. 491; Rob. & J. Dig. 432).

But to sustain the preference the pressure must have been real, and not a feigned contrivance between the debtor and creditor to wear the

appearance of pressure for the mere purpose of giving effect to the SEC. 133. debtor's desire and intention to give a preference, (*Clemmon vs. Con- Preferential sales, &c.* verse, 16 Chy. 547; Rob. & J. Dig. 432).

M. had in his warehouse 2500 bushels of rye, belonging to T. & W. They owed him \$1,400, made up of money due for storing that and other grain, for grain supplied to them, and for balance of account. T. & W. were insolvent, and their creditors pressing them, of which M. was aware. They demanded the grain more than once, alleging that it would enable them to meet their creditors' immediate demands, but M. refused, saying it was his only security: and in the end T. offered, if M. would give it up, and a receipt of the debt due to him by T. & W. to assign to M. his interest in a vessel, then worth about \$1,600. This M. assented to, and on the 20th November T. executed a bill of sale of his interest to M. and received the grain. This transfer, however, being informal, was returned by the custom house authorities, and another one executed on the 5th December. On the 7th January an attachment in insolvency issued against T.:—Held, that as M. had demanded payment, and the transfer was made on the express condition that the rye should be given up, the transaction must be regarded as not a voluntary one, and therefore not one by which M. had obtained an unjust preference:—Held, also, that the transaction must be looked at as if carried out on the 20th November, (*McFarlane vs. McDonald*, 21 Chy. 319; Rob. & J. Dig. 431.)

The Insolvent Act (1864) forbids mortgages of real estate to a creditor by way of preference, (*Curtis vs. Dale*, 2 Chy. Chamb. 184; Rob. & J. Dig. 431).

But where the mortgagor did not believe he was insolvent (though the mortgagee feared he was so) and made a mortgage of real estate under pressure on the part of the mortgagee, and in the belief that he (the mortgagor) would thereby be enabled to continue his business and pay his liabilities in full, the mortgage was held valid as against his assignee in insolvency. *Ib.* 432.

A mortgage was obtained by pressure from an insolvent person, a miller, three months before he executed an assignment in insolvency; the mortgage was for an antecedent debt, and was not enforceable for two years: it comprised the mortgagor's mill only, and left untouched about one-third of his assets: it was not executed with intent to give the mortgagees a preference; and at the time of obtaining it they were not aware of the mortgagor's insolvency. In a suit by the assignee in insolvency, impeaching the transaction, the mortgage was held to be valid, (*McWhirter vs. Royal Canadian Bank*, 17 Chy. 480; Rob. & J. Dig. 432).

**SEC. 133.** A banking firm in Toronto having become embarrassed by gold operations in New York applied to the plaintiffs, to whom they owed \$50,000, to advance them \$15,000, and in order to obtain the advance they offered to secure both debts by a mortgage on the real estate of one of the partners worth \$30,000. The plaintiffs agreed, made the advance, and obtained the mortgage. In less than three months afterwards the debtors became insolvent under the Act. They were indebted beyond their means of paying at the time of executing the mortgage, but they did not consider themselves so, nor were the mortgagees aware of it. The mortgage was not given from a desire to prefer the mortgagees over other creditors, but solely as a means of obtaining the advance which they thought would enable them to go on with their business and pay all their creditors:—Held, that, as respects the antecedent debt, the mortgage was valid as against the assignee in insolvency, (*Royal Canadian Bank vs. Kerr*, 17 Chy. 47; Rob. & J. Dig. 435).

In 1869 C. lent money to N. on an express agreement that it was to be secured by mortgage on certain property, and on the 3rd July following the mortgage was given accordingly; and on the 2nd August the mortgagor became insolvent:—Held, that the mortgage was valid, (*Allan vs. Clarkson*, 17 Chy. 570; Rob. & J. Dig. 435).

The insolvent, an innkeeper, on the 12th of August, 1869, gave the plaintiff a mortgage upon the whole of his property, payable in six months for an overdue debt. The attachment in insolvency issued on the 6th December following, and the assignee seized and sold the goods. The evidence shewed that the mortgagor knew or had strong reasons to believe himself to be insolvent when he gave the mortgage, but that the defendant did not know it, and that the mortgage was given under pressure by defendant, and not with intent to defeat or delay creditors:—Held that under these circumstances it was not void under the Insolvent Act as against the assignee, (*Archibald vs. Halden*, 31 Q. B. 295; Rob. & J. Dig. 431).

**Security given in consideration of further advances.** A person in embarrassed circumstances applied to one of his creditors to supply him with goods to enable him to carry on his business, which the creditor agreed to supply on obtaining security therefor, as also for his pre-existing debt, and a chattel mortgage for this purpose was accordingly given, and the goods supplied:—Held, not such a preference as rendered the chattel mortgage void, (*Risk vs. Sleeman*, 21 Chy. 250; Rob. & J. Dig. 435).

**Chattel mortgage for further consideration.** It has been held in Ontario that a chattel mortgage given within thirty days of insolvency, by Mathers, a trader, on all his stock in trade, to one Lynch, in consideration of the latter indorsing notes, to

enable the former to purchase goods to carry on his business, was not SEC. 133.  
 a fraudulent preference, under that section of the Act of 1864, from Preferential  
 which the sec. under review is copied, although its effect might be to sales, &c.  
 delay the creditors; because Lynch had been ignorant of the position  
 of Mathers, and became a creditor by this transaction only, and  
 obtained no security for any pre-existing claim. But, although not  
 absolutely void under this section, the court remarked it might be  
 voidable under a sec. identical to sec. 87 of the Act of 1869. 27  
 Q. B. Rep. 244.

A somewhat similar decision was given in Montreal, in *Warren & Shaw, & Warner* contest. Vide 12 L. C. Jur. 309.

Under sec. 89 of the Insolvent Act of 1869 the presumption that Presumption of  
 transactions within thirty days next before the assignment, &c., were fraud may be  
 made in contemplation of insolvency, is not conclusive, but may be rebutted.  
 In this case the creditor, who lived twenty miles from the insolvent's house, had a mortgage on the insolvent's house for \$900, of which \$400 was due. On the 8th February he wrote to the insolvent to call and arrange matters the next time he was in, and on the 9th he purchased from the insolvent about \$1,400 worth of pork, on condition that \$600 should go upon the mortgage, and he paid the balance of the purchase money to other creditors. An attachment in insolvency issued on the 3rd March, and the assignee brought this suit against the creditor to avoid the transaction. The creditor said he did not wish to press the debtor in any way, but wanted his money. The debtor owed about \$3,000, and his property produced only \$1,000. There was contradictory evidence as to defendant knowing or having probable cause for believing that the debtor was unable to meet his engagements and as to whether the property mortgaged was worth more than the balance left due upon it. The jury having found in favour of the defendant, the creditor, the court held that the transaction was not avoided by force of the statute, and upon the facts they refused to interfere:—Held, also, that the insolvent could not, under the circumstances, be said to have acted voluntarily, within the meaning attached to that word by the decided cases, (*Campbell vs. Barrie*, 31 Q. B. 279; *Rob. & J. Dig.* 431).

“Contemplation of insolvency does not mean co-contemplation of the issue of a writ. It is enough if a party knows himself to be in such a situation that he must be supposed to anticipate that bankruptcy would in all human probability follow, though not immediately,” (*Gibbons v. Phillips*, 7 B. & C. 529.) Wilde, C. J., in construing this term, expressed his opinion, “that if a payment were made at a time when the bankrupts had a view to bankruptcy,

**SEC. 133.** "though they might hope to avoid bankruptcy, yet, made with the Preferential sales, &c. object of giving the creditor an eventual advantage if the bank-ruptcy did take place, the payment was illegal and invalid." (*Brown v. Kimpton*, 13 L. T. Rep. 11.)

Payment to bona fide creditor.

By our law, *payment* made within thirty days before assignment to a creditor, ignorant and having no probable cause of knowing of the insolvent's inability to meet his engagements (§ 134 *post*), is not invalid; but, nevertheless, these English decisions are applicable to illustrate the legal effect of the words "contemplation of insolvency," upon the transactions specified in the sec. under review.

The object of these decisions is to prevent undue preference, and to have the bankrupt's assets equally apportioned among all his creditors. *Doria & Macrae*, Bank. 151.

Doctrine not new.

In cases of insolvency, this doctrine has been held in the courts of Quebec, anterior to the existence of the Insolvent law; and it has always existed and still exists in France. (Jouse Com, on Ord. of 1673; Rep. de Guyot vs. Deconfiture, p. 299; *Bryson v. Dickson*, 3 L. C. Rep. 65; *Sharing v. Meunier*, 7 L. C. Rep. 250; *Cumming v. Mann*, 2 L. C. Jur. 195; *Cumming v. Smith*. 5 L. C. Jur. 1; *Withall & Young & Michon*, 10 L. C. Rep. 149; Civ. Code L. C. Ob. Nos. 51 to 60.)

**Royal Canadian Bank vs. Whyte.** To these cases may be added *The Royal Canadian Bank v. Whyte*, decided in the Court of Queen's Bench (in appeal) in Montreal, in Septr. 1869.

This bank had discounted paper for one Middleton, for more than \$8,000.00. A part of this amount (\$4,500) was represented by Middleton's acceptance, which had been protested on the 15th June, 1867. On the same date various notes of his, discounted by the bank fell due, and he was unable to pay them. He then, by a warehouse receipt, transferred to the bank, in part settlement of his acceptance, a quantity of coal, valued at \$3,000. In the following month of August he absconded, and a writ of attachment was accordingly issued, and the estate placed in the hands of Whyte, the respondent, as the official assignee. During this period the coal remained in Middleton's yard, and upon the issue of the writ, the bank claimed the coals by a writ of revendication. The assignee contested the claim, on the ground that the transfer of the coals was given in contemplation of insolvency, whereby the bank might obtain an unjust preference; that Middleton was insolvent at the time of the transfer, and the bank must be presumed to have been also then aware of it. These views were taken by the Superior Court, and the bank thereupon carried it to appeal, where the judgment was confirmed.

*Badgley*, J. in rendering judgment, in appeal, observed: "There

" was certainly a fraudulent preference in this case. It arises, SEC. 133.  
 " when a trader, knowing himself to be insolvent, or even likely to Preferential sales, &c.  
 " become so, makes a delivery of property, not in the ordinary course  
 " of his business, to a creditor for an antecedent debt."

See also the case of *Brown v. Paxton* decided in the same Court in March 1875.

This rule of law must not be supposed to extend to cases where Security given in good faith may be given, in good faith, and not in contemplation of insolvency, for an equivalent consideration. Doria & Macrae, 152. Thus a bill of sale given to secure an advance made on the faith of the security, to enable a trader to carry on his business, is not an act of bankruptcy, although it would, if the security were either wholly or partly an antecedent debt contracted without security. Doria & Macrae, 150.

As regards ordinary creditors, their ignorance of the debtor's Ignorance by creditor no bar. inability to pay his debts will not, under this section, validate a transfer. It is the policy of the law to distribute the insolvent's effects rateably among the creditors, (*Adams v. McCall*, 25 Q. B. Rep. 219 Ontario). But to avoid a transaction under this sec. there must be a contemplation of insolvency, coupled with a fraudulent preference, (*McWhirter v. Thorne*, C. P. Rep. (Ontario), 302. Pop. p. 118).

Such a sale, &c., made after insolvency is also void, (*Roe v. the Royal Canadian Bank*, 19 U. C. C. P. 347).

A fraudulent intent may not be necessary to the avoidance of such transaction, (*McWhirter v. Thorne*, 19. U. C. C. P. 302).

The effect of bankruptcy upon a fraudulent preference is not to dis- Effect of bank-ruptcy on fraud-  
vest the transferee of the property, but, notwithstanding the bank-dulgent prefer-  
ruptcy, it continues vested in the transferee, subject to be divested by ence.  
 the assignees at their election ; and the commencement of an action of trover, which may be discontinued at any time, and which assumes that the goods came into the possession of the defendant lawfully, is not an election on the part of the assignee to avoid the transfer. Therefore, where goods had been transferred by a trader before his bankruptcy by way of fraudulent preference, and the transferee, after the appointment of the assignees, had brought an action against a third party for an illegal and excessive distress upon the goods so transferred, the defendant could not set up the bankruptcy as a defence, when the assignees had done no other act in assertion of their rights than commencing an action of trover for the same goods, (*Newnham v. Stevenson*, 15 Jur. 360 ; 20 L. J. C. P. 111).

**SEC. 133.** Every chattel-mortgage made by an insolvent within thirty days before a voluntary assignment is not necessarily void under this section when taken in the way of business, in an ordinary transaction, and where the mortgagee has no reason to suspect that the mortgagor contemplated insolvency. One J., being a retail dealer, and wanting goods to carry on his business, asked one M. to endorse notes to enable him to purchase them. To this M. consented on condition that J., on receiving the goods should secure him against loss by a mortgage thereon, and on the other goods in J.'s store, who was to sell them at his store only, and out of the proceeds retire the notes, and, if he should sell otherwise, M. might sell the goods for his own protection. M. accordingly endorsed, and J. with the notes purchased goods which he mortgaged to M., as agreed on, with other goods, for the *bonâ fide* and sole consideration of perfecting the said agreement. J. afterwards, and within thirty days from the date of the mortgage, but without M.'s consent, made a voluntary assignment to an official assignee. This mortgage was upheld as against the assignee, and in giving judgment Hagarty, C.J., remarks: It was a very natural, and possibly highly beneficial arrangement for the trader to make, at least so far as it was possible for M. to foresee. Its effect might be, as is remarked in many of the cases, to delay creditors, but that alone does not avoid a transaction otherwise lawful, nor are we prepared to hold that the mere fact that the trader contemplated insolvency will alone defeat the remedy and security of a person dealing with him as M. seems to have done, in the way of business, in an ordinary transaction, and having no reason whatever to suspect what may be passing in the trader's mind," (*Mathers v. Lynch*, 27 Q. B. U. C. 244).

Fraudulent preference essential.

To avoid a transaction under this section, not only must there be a contemplation of insolvency, but, coupled with it a fraudulent preference of the creditor, to whom the transfer or payment is made over the other creditors. In the case cited below the insolvent, about two months before the issue of a writ of attachment against him, assigned to defendant, a creditor a policy of insurance upon certain merchandise, in security for a debt which was about to be placed in suit, and the insurance company, upon the occurrence of a fire, paid over the proceeds of the policy to the creditor, to the extent of the debt received thereby. At the trial the plaintiff, who claimed, as assignee, to recover back this amount, called the insolvent, who swore that when he assigned the policy he had no contemplation of insolvency, that his intention was, with his remaining assets and the residue of the money derived from the policy, after paying defendant, to re-open his

business, but that he was driven into insolvency by the act of a certain creditor, who, though he had promised him time, sued out a writ of attachment against him.

It was held that the transfer of the policy not having been made within thirty days of the issue of the writ of attachment, the onus was cast upon the plaintiff of proving that the transfer was made in contemplation of insolvency, and that the above facts were insufficient to sustain that contention.

On the 25th November, 1864, an agreement was made by one S. to deliver certain timber at prices payable partly before and partly on delivery. On the 14th December following S. assigned the timber to a mortgagee as security for certain advances. The mortgagee wrote to the purchaser that S. desired to deliver the timber to him but was in difficulty; that some of the creditors refused to wait until he could complete his contract, and had commenced actions, and recommending the purchaser to anticipate their action by taking a delivery before they could interfere. On the 11th of March the purchaser accordingly paid the mortgagee's claim and took a delivery. On 14th April S. made an assignment under the Insolvent Act of 1864. He admitted that he was insolvent on the 11th March, and long previous, though he said he did not then know it, and had not informed the purchaser of it. It was held that these facts shewed the delivery to the purchaser to be a transfer by S., "in contemplation of insolvency," the effect of which was to give him "an unjust preference" over the other creditors, and that it was therefore void under this section, (*Adams v. Mc Call*, 25 Q. B. U. C. 219).

The test to determine whether a transaction is void under this section is precisely the same as is applied under the English bankruptcy law to determine whether a transaction is void, as being by way of fraudulent preference, (*Mc Whirter v. Thorne*, 19 C. P. U. C. 302); see *Payne v. Hendry*, 20 Grant, 142.

An insolvent absconded to the United States taking money with him. He was followed there by the agent of a person in this country, who had become surety for him, and, by the threats of criminal proceedings, induced him to pay the amount of the debt. A bill filed by the official assignee, to recover the money from the surety was dismissed with costs, (*Roe v. Smith*, 15 Grant, 344).

Acts which constitute fraudulent preferences under this section not only render the transfer null and void, but may (sec. 56 *ante*) be the ground for refusing the discharge of the insolvent; and even when the fraudulent preferences were created before the passing of the Act of 1864, (*in re Owens*, 12 Grant, 560). This section does not

Money forced  
from insolvent  
in foreign coun-  
try not recover-  
able by as-  
signee.

Grounds for re-  
fusing dis-  
charge.

**SEC. 133.** invalidate conveyances executed before the Act passed, and which were valid at the time of their execution, (*Gordon v. Young*, 12 Grant, 318).

Certain payments by debtor void.

**134.** Every payment made within thirty days next before a demand of an assignment, whenever such demand shall have been followed by an assignment, or by the issue of a writ of attachment, or within thirty days next before the issue of a writ of attachment under this Act, when such writ has not been founded upon a demand, by a debtor unable to meet his engagements in full, to a person knowing such inability, or having probable cause for believing the same to exist, shall be void, and the amount paid may be recovered back by suit in any competent court, for the benefit of the estate. Provided always, that if any valuable security be given up in consideration of such payment, such security or the value thereof, shall be restored to the creditor before the return of such payment can be demanded.

Payment made within the 30 days preceding assignment to obtain release from capias is only null when creditor was aware of insolvency or had probable reason to believe it, (*Larivière v. Sauvageau*, 2 Rev. Leg. p. 186; 14 L. C. J. P. 149).

**Payment recoverable though creditor ignorant of position.** A payment by an insolvent after the issue of a writ of attachment against him, on account of a draft discounted by defendants for him, and dishonored by non-acceptance, was recoverable back by the official assignee, though the defendants were ignorant of the insolvency when they received the money from the insolvent, (*Roe v. Royal Canadian Bank*, 19 C. P. 347; followed in *Roe v. Bank of British North America*, 29 C.P. 351, Rob. & J. Dig. 438).

**Note given by third party in settlement of insolvent's debt** Knox being indebted to one Kyle, and Kyle to defendant, it was arranged that defendant should take Knox as his debtor, defendant crediting Kyle with the amount which Knox owed to Kyle, and Kyle discharging Knox; and Knox accordingly gave defendant his note for the amount. This took place within thirty days before Kyle made an assignment in insolvency, and his assignee brought trover for the note, contending that the transaction was avoided by sec.8, sub.-sec.4 of the Insolvent Act of 1864; but, held, not, for the note never was the insolvent's property, and so never passed to the assignee; and even if it was a transfer or payment by Kyle within the Act, and so avoided, this would not entitle the plaintiff to the note, (*McGregor v. Hume*, 28; Q. B. 380, Rob. & J. Dig. 416).

The insolvent, about two months before the attachment against SEC. 4.  
 him and his assignment consequent thereupon, assigned to defendant, a creditor, a policy of insurance upon merchandise in preferences.  
 security for a debt about to be placed in suit, and the insurance company upon a fire, paid over the proceeds of the policy to the creditor to the extent of his debts. The plaintiff claimed as assignee to recover back this amount, and he called the insolvent, who swore that when he assigned the policy he had no contemplation of insolvency : that his intention was, with the remaining assets and the residue of the moneys from the policy, after paying defendant, to re-open his business, but that he was driven into insolvency by the act of a creditor, who, though he had promised him time, sued out a writ of attachment against him :—Held, that the onus being upon the plaintiff of proving that the transfer of the policy was made by the debtor in contemplation of insolvency, (if not having been made within thirty days of the issue of attachment, or of the execution of the deed of assignment,) the evidence produced by him failed to establish this fact, and that the verdict, therefore, for the defendant was right:—Held, also, that there was no fraudulent preference, it not being pretended that the assignment of the policy was the spontaneous act of the debtor, but the fair inference being that it was made in consequence of pressure by the creditor :—Held, also, that sub-sec. 5 of sec. 8 clearly did not apply to this case, the money received by defendant not having been a payment by a debtor, unable to meet his engagements in full, but having been received under the assignment of the policy and from the Company ; that the assignment being valid it was quite immaterial whether when the money was paid, the defendant knew or had probable cause for believing in the then inability of the insolvent to pay his debts in full, (*Mc Whirter v. Thorne*, 19 C. P. 302 ; Rob. & J. Dig. 431).

An insolvent absconded to the United States, taking money with him. He was followed there by the agent of a person in this country who had become surety for him, and, by the threats of criminal proceedings, induced to pay the amount of the security. A bill, by the official assignee, to recover the money from the surety, was dismissed with costs, (*Roe v. Smith*, 15 Chy. 344 ; Rob. & J. Dig. 431).

Previous to an act of insolvency, certain lands in which the insolvent, a defendant in a suit in chancery, had an equitable interest, had been ordered to be sold, and were afterwards sold, and the purchase money paid to the plaintiff in equity : the assignee in insolvency moved that such moneys be paid into court for the benefit of general creditors. It was held that the lands were subject to the order

Payments or  
securities given  
under pressure.

Receipt by  
plaintiff of  
money, for  
lands sold in  
chancery.

**SEC. 134.** for sale ; and the motion refused, (*Yale v. Tollerton*, Chanc. Cham. Rep. 49.)

**English rules on the subject.** For the English rules on the subject of protection of payments by and to the bankrupt, see *Doria & Macrae*, 456 *et seq.* Archbold, Bank. 348. But in the application of them to this statute as to payments, it must be borne in mind, that in England no payment is reputed fraudulent, though made "in contemplation of bankruptcy," if made *involuntarily*, that is, on the demand, verbal or otherwise, of the creditor ; and not even when the debt has not matured, if the demand be *bona fide*. See *Strachan v. Barton*, 34 Law & Eq. Rep. 492. This distinction is very properly not recognised by our law.

**French rules.** Under the law of France, a person having knowledge of, or probable cause for believing the trader's insolvency, is held to be a participant in the fraud ; and art. 446 of the *Code de Commerce* of 1838 contains a provision similar to this section. See also Ord. 1673, tit. XI, art. 4; 2 Chardon du Dol, No. 208; Nouv. Den. vo. Fraude ; 2 Namur, Droit Coml. 449 *et seq.* Pop. 119.

Preferential transfers have not been to any great extent the subject of legislation in England, but they are deemed void by the courts as being a fraud upon the bankrupt laws, (*Crosby v. Couch*, 2 Camp. 166; 11 East. 256; *Alderson v. Temple*, 4 Burr. 2235; 1 W. Bl. 660). Although the period of thirty days before, &c., is given in this section, as the time in which a payment made by a debtor unable to meet his engagements to a person cognizant thereof, would be void, there can be little doubt that, under English authorities, preferential payments made before that time may be held void as being against the spirit of, and a fraud upon, the Act. It has been held that if a party voluntarily make a payment, by which the equal distribution of his property in bankruptcy will be defeated, such payment is a fraudulent preference, though the bankrupt in making it did not intend to benefit, and in fact did not benefit the particular creditor. For instance, where a bankrupt paid off a mortgage on property settled to the use of his wife, who had joined in such mortgage, without previous notice to, or request by the creditor, to whom it would have been equally beneficial to retain the mortgage, the bankrupt intending only by such payment to liberate his wife's property for his own and her benefit ; this has been, nevertheless, held to be a fraudulent preference, (*Marshall v. Lamb*, 5 Q. B. 115; 7 Jur. 850). The mortgage, however, would come under the description of valuable securities in this clause, and the creditor would be entitled to have it restored.

The words of this section, as they stand, would seem to apply to all payments made within thirty days, and to render them void

whether made voluntarily or under the compulsion of a *bona fide* SEC. 134. creditor. It would be against the spirit of the cases on the point, *Fraudulent* however, if a payment made under pressure for instance of a law-*preferences*. suit should be held void if made within that period, (*De Tastet v. Carroll*, 1 Stark, 88; *ex parte De Tastet*, Mon. 138, 153; *Atkins v. Seward*, Manning's Index, 62 pl. 181; *Thompson v. Freeman*, 17 R. 155; *Kinnear v. Johnstone*, Q. F. & F. 735; *Pennell v. Heading*, Q. F. & F. 744, Erle, C. J.)

**135.** Any transfer of a debt due by the Insolvent, made within the time and under the circumstances in the next preceding section mentioned, or at any time afterwards, whenever such demand shall have been followed by an assignment or by the issue of such writ of attachment, to a debtor knowing or having probable cause for believing the Insolvent to be unable to meet his engagements, or in contemplation of his insolvency, for the purpose of enabling the debtor to set up by way of compensation or set-off the debt so transferred, is null and void, as regards the estate of the Insolvent; and the debt due to the estate of the Insolvent shall not be compensated or affected in any manner by a claim so acquired; but the purchaser thereof may rank on the estate in the place and stead of the original creditor.

Transfer of certain debts by insolvent void.

See notes to preceding sections.

**136.** Any person who, for himself or for any firm, partnership or company of which he forms part, or as the manager, trustee, agent or employee of any person, firm, copartnership or company, purchases goods on credit, or procures any advance in money, or procures the indorsement or acceptance of any negotiable paper without consideration, or induces any person to become security for him, knowing or believing himself or such person, firm, copartnership or company for which he is acting to be unable to meet his or its engagements, and concealing the fact from the person thereby becoming his creditor, with the intent to defraud such person, or who by any false pretence obtains a term of credit for the payment of any advance or loan of money, or of the price or any part of the price of any goods, wares or merchandise, with intent to defraud the person thereby becoming his

Purchasing goods on credit by persons knowing themselves unable to pay, to be fraud, and how punishable.

**SEC. 136.** creditor, or the creditor of such person, firm, copartnership or company, and who shall not afterwards have paid or caused to be paid the debt or debts so incurred, shall be held to be guilty of a fraud, and shall be liable to imprisonment for such time as the court may order, not exceeding two years, unless the debt and costs be sooner paid: Provided always, that in the suit or proceeding taken for the recovery of such debt or debts, the defendant be charged with such fraud, and be declared to be guilty of it by the judgment rendered in such suit or proceeding.

**Proviso.** This section is much more ample than the corresponding one (92) in the Act of 1869, but leaves out the provision that every member of a firm knowing of a fraud or intention shall be held similarly liable.

**Concealment necessary to create fraud.** A purchase of goods by persons unable to pay their debts in full is not fraudulent (within sect. 92 of the Act of 1869), unless such inability is concealed from the creditor with intent to defraud him, (*in re Garratt et al.*, 28 Q. B. 266 Rob. & J. Dig. 436).

**Purchase on credit implies solvency.** He who buys goods on credit impliedly assures the vendor, if not of the actual sufficiency of his assets to meet his liabilities, at least that there is a reasonable probability of such sufficiency; and while a vendor on credit takes the risk of the subsequent insolvency of his debtor, he is not supposed to contemplate the escape on the bankruptcy of his debtor, by reason of a state of insolvency actually existing at the time of the purchase; and where a party buys goods on credit, knowing his affairs to be in a bad state, although he may have no intention of defrauding the vendor, and he subsequently declares his insolvency, the Court will be justified in suspending his discharge for a period, under its discretionary power, (*ex parte Tempest et Duchesnay et vir*, S. C. 11 L. C. J., p. 57; 2 L. C. L. J., p. 276, 1867).

This section contains the words "debt and costs" instead of "debt or costs" as in the Act of 1869,—a necessary change as will appear from the following case:

In ordering imprisonment under the 92nd section of the Act, the Court is bound to limit the payment, by way of release, (in the precise words of the Act) to "the debt or costs," (*Warner v. Buss*, S. C., 18 L. C. J., p. 185); but in another case it was held, where the Court is satisfied that the fraud charged, in an action under the 92nd section of the Act, has been proved, the insolvents will be ordered to be imprisoned in default of payment of costs as well as of the debt, (*Rogers et al.*, and *Sancer et al.*, Q. B. 18 L. C. J., p. 57.)

In addition to inflicting a severe punishment upon the insolvent under this clause, the creditors may take advantage of his conduct for the purpose of opposing his discharge (sec. 56 *ante*) ; and the mis-purchase of conduct need not be shewn to have occurred since the passing of goods. SEC. '136.  
the Act of 1864, (*in re Owens*, 12 Grant, 560).

When a person in business finds himself unable to pay twenty shillings in the pound, it may or may not be his duty to discontinue his trade, according to circumstances: continuing his business may be a fraud, but it is not necessarily so, and may not disentitle him to his discharge, (*in re Robert Holt and John Gray*, 13 Grant, 563). In another case Mr. Justice Adam Wilson says:—"The mere fact of a trader purchasing goods, who is at the time unable to meet his engagements, is neither fraud nor within the provisions of the Insolvent Act. A purchase may under such circumstances be the very best and wisest act which the trader could do, and may be the most beneficial act for his creditors. Such a purchase may be the very means of reinstating him, and relieving him from difficulty. Inability to pay is no more fraud, though it was thought so in former times when bankruptcy was esteemed a crime, than solvency is honesty, though some may think it so," (*in re Garratt & Co.*, 28 Q. B. U. C. 266).

But although the purchase of goods on credit, under the circumstances detailed in this sec., should be followed by adequate punishment, where bad faith is apparent; cases may arise, in certain classes of business, wherein it may not be the duty of the trader to discontinue trading, as soon as he finds himself unable to pay in full. See *in re Holt*, 13 Chancy Rep. (Ontario) 568; see also *in re Thurber & Young et al* contesting; *in re Tempest & Duchesnay*; and *in re Freer & Gilmour*, (given in note to sec. 103 *post*.)

The language of this section referring to the insolvent's "knowing or believing himself to be unable to meet his engagements, when he purchase purchases goods on credit or procures advances in money," is much the same in terms and meaning as the words in the 159th section of the English Act of 1861. This latter section declares the insolvent to be guilty of a misdemeanor, if the court is of opinion "that he could not have had, at the time when any of his debts were contracted, any reasonable or probable ground of expectation of being able to pay the same." The *onus* of proving this offence is upon the opposing creditor. He may support his case by examining the insolvent in reference to his state of embarrassment at the time of contracting any particular debt, and also may investigate his accounts, which shew the profits made and any other income he may have received in such year, and whether it was increasing or diminishing. The extent of the insolvent's liabilities in any given

**SEC. 136.** year, may also be easily ascertained: On his examination he may be pressed closely by counsel with such questions as the following:— Is any creditor pressing him? Has any writ been issued against him? Has he made or endorsed any notes after had failed to meet others? Has he become security, or entered into pecuniary engagements for others, when he could not pay his own debts? How many accommodation notes has he made or endorsed? Has he any means of payment in the event of the other party or parties to these notes failing to meet them, and himself being called upon to do so? Lord Cranworth held (*in re Marks*, 1 L. R. Chy. 334), under the circumstances of the case, that the bankrupt had not contracted a debt without any reasonable or probable ground of expectation of being able to pay it, although he obtained goods on credit while insolvent, and soon afterwards sold them for less than their cost price. The cases go to shew that the court will form its judgment as to the insolvent's expectations of being able to pay any debt at the time he contracted it from a general view of his income, earnings and property on the one hand, and the liabilities hanging over him on the other. He must appear to have contracted new debts after manifold proof given of his incapacity to liquidate existing demands upon him. Allowance will also be made for a fair prospect of professional exertions, or commercial enterprise, for the reasonable hopes of assistance from friends, and many other contingencies of life. In cases of doubt, the character of the debt will also be considered, as to whether it was contracted for luxuries or the necessary support of the insolvent's family, or in the ordinary course of trade. It cannot be contended that a man must leave off trade because he is in difficulties; and the system of trade in this country is so thoroughly based upon credits, that no trader in the Dominion at all in difficulties could carry on trade without " purchasing goods on credit or procuring advances in money," (see *ex parte Johnson*, 4 De G. & S. 25; *ex parte Dornford*, 4 De G. & S. 29; *ex parte Rufford*, 2 D. M. & G. 234; *ex parte Dobson*, 6 D. M. & G. 781; *ex parte Selby*, 6 D. M. & G. 783; *ex parte Brundrit*, *in re Caldwell*, 3 L. R. Chy. 26; *ex parte Bayley*, *in re Ainsworth*, 3 L. R. Chy. 244). Edgar, P. 108.

**Overdrawing account.**

Overdrawing an account current at a banker's by a person in insolvent circumstances does not in itself amount to contracting a debt without reasonable or probable ground of expectation of being able to pay the same, (*ex parte Harrison*, 2 L. R. Chy. 195).

Filing claim  
no bar to proceedings.

A creditor may petition for the imprisonment of the insolvent under this section, even though he has filed a claim on his estate, (*Gault et al. v. Lagarde*, Superior Court, Montreal, November, 1874,

unreported). In this suit the learned Judge (Beaudry) in rendering SEC. 136. his decision said :—

This action is against an insolvent trader, who made an assignment for the price of goods for which he had given his notes, and asking for his imprisonment on the ground of fraud, and that he was aware of his insolvency when he bought the goods. The points at issue are these :—1st, Is the defendant guilty of fraud in being aware of his insolvency and concealing the fact from the plaintiffs, according to section 92 of the Insolvent Act of 1869 ? 2nd. If so, can plaintiffs claim the debt, at the same time as they prosecute him for the fraud ? On the first point I find him to have been bankrupt two months before the purchase. In February, 1873, he made an inventory but did not enter among his liabilities an amount of \$10,000 he owed his brother-in-law, Rascorny, and he admits that, by including that, he was bankrupt. That debt he conceals even from his bookkeeper, who told a clerk of plaintiffs he could pay thirty shillings. The insolvency being clear, the intent to defraud appears from his concealment and his purchases. I find the case comes under section 92 of the Insolvent Act. On the second point it is argued that the plaintiffs having chosen their tribunal, namely by filing their claim with the assignee, they cannot now come before this Court for imprisonment. I cannot admit this. The assignee is merely an officer appointed to wind up the estate, as a sheriff or bailiff in other cases, and with the power to apportion among the recognized creditors, as the Prothonotary would draw up a report of distribution. It is true claims are contested before the assignee subject to appeal ; but the contestation relates merely to the distribution of the monies. For all matters beyond the assignee's duties, the ordinary Courts have their usual jurisdiction. The Insolvent Act does not restrict that jurisdiction, and the only means of stopping suits against a bankrupt is a discharge granted or a composition ratified by the Court. Sec. 66 of the Act, by refusing the collocation of costs incurred after an assignment, is an admission of the right of a creditor to continue any suit begun by him at his own cost. When a debtor does not obtain his discharge he is exposed to any actions his creditors may bring without prejudice to other creditors. Section 92 itself would not be complete if the condemnation to payment did not accompany it ; the punishment of fraud and the terms employed rebut defendant's pretensions. Read the proviso at the end of the section, “ provided always that in the suit “ or proceeding taken for the recovery of such debt or debts, the “ defendant be charged with such fraud and be declared to be “ guilty of it by the judgment rendered in such suit or proceeding.””

Fraudulent purchase of goods.

Mere concealment of position makes presumption of fraud.

**SEC. 136.** Nothing more is needed, in my opinion, to destroy defendant's plea.

Fraudulent purchase of goods.

But, says the defendant, the plaintiffs have already received a considerable sum from the assignee on account of their debt. This amount must necessarily be deducted from the amount now claimed, The dividends which may be allowed plaintiffs must go to defendant's credit, and must be accounted for to him if he wishes to pay and avoid imprisonment, and the judgment will provide for this. In default of payment he will be imprisoned six months.

Concealment and intent must exist at time of purchase.

The concealment and intent must exist at the time of the purchase, (*in re Garrett & Co., Insol.*, 28 Q. B. Rep. Ontario 266.) "It is not, however, necessary in order to constitute fraud, that a man who makes a false representation should know it to be false. It is enough that it be false, if made without an honest belief, \* \* \* and be made deliberately with intent to defraud." Kerr, Fraud, 12. There must be a fraudulent intent ; and this intent will be presumed, where a man makes false statements with a view of benefiting himself, or misleading another. And this intent will be also presumed where a man knowingly makes a false representation, or having insufficient grounds for believing it, whereby another is misled to his prejudice, although at the time of making it he may have had no intention to benefit himself, or to injure the person to whom the representation was made. *Ibid.* pp. 13 & 14.

Fraud must be proved.

**137.** Whether the defendant in any such case appear and plead, or make default, the plaintiff shall be bound to prove the fraud charged, and upon his proving it, if the trial be before a jury, the judge who tries the suit or proceeding shall immediately after the verdict rendered against the defendant for such fraud, (if such verdict is given), or if not before a jury, then immediately upon his rendering his judgment in the premises, adjudge the term of imprisonment which the defendant shall undergo ; and he shall forthwith order and direct the defendant to be taken into custody and imprisoned accordingly ; but such judgment shall be subject to the ordinary remedies for the revision thereof, or of any proceeding in the case.

The revision and appeal provided for in this section are subject to the delays and rules provided by section 128 *ante*.

Assignees to be deemed agents for certain purposes under 32-38 V., c. 21.

**138.** Every Assignee, to whom an assignment is made under this Act, is an agent within the meaning of the seventy-sixth and following sections of the "Act respect-

*ing Larceny and other similar offences,"* and every provision of this Act, or resolution of the creditors, relating to the duties of an Assignee, shall be held to be a direction in writing, within the meaning of the said seventysixth section; and in an indictment against an Assignee, under any of the said sections, the right of property in any moneys, security, matter or thing, may be laid in "the creditors of the Insolvent (*naming him,*) under the Insolvent Act of 1875," or in the name of any Assignee subsequently appointed, in his quality of such Assignee.

For the "Act respecting Larceny, &c.," see 32 & 33 Vic. (1869), c. 21.

**139.** Any Assignee who in any certificate required by this Act shall wilfully misstate or falsely represent any material fact for the purpose of deceiving the judge, the creditors, or the Inspectors, shall be guilty of a misdemeanor, and shall be liable, at the discretion of the court before which he shall be convicted, to imprisonment for a term not exceeding three years.

**140.** From and after the coming into force of this Act, any Insolvent who, with regard to his estate,—or any president, director, manager or employee of any copartnership, or of any incorporated company not specially excepted in the first section of this Act, with regard to the estate of such copartnership or company, who shall do any of the acts or things following with intent to defraud, or defeat the rights of his or its creditors, shall be guilty of a misdemeanor, and shall be liable, at the discretion of the court before which he is convicted, to punishment by imprisonment for not more than three years, or to any greater punishment attached to the offence by any existing Statute.

If he does not upon examination fully and truly discover to the best of his knowledge and belief, all his property, real and personal, inclusive of his rights and credits, and how and to whom, and for what consideration, and when he disposed of, assigned or transferred the same or any part thereof, except such part has been really and *bona fide* before sold or disposed of in the way of his trade or business, or laid out in ordinary family or

Crimes by  
assignee.

Punishment of  
insolvent making  
wilful mis-  
statement.

Certain acts by  
insolvents to be  
misdemeanors.

Not fully dis-  
covering or not  
delivering pro-  
perty, books,  
papers, &c.

**SEC. 140.** household expenses, and fully, clearly and truly state the causes to which his insolvency is owing ; or shall not deliver up to the Assignee all such part thereof as is in his possession, custody or power, (except such part thereof as is exempt from seizure as hereinbefore provided,) and also all books, papers and writings in his possession, custody or power relating to his property or affairs ;

**Removing property.** If within thirty days prior to the demand of assignment, or the issue of a writ of attachment under this Act, he doth, with intent to defraud his creditors, remove, conceal or embezzle any part of his property, to the value of fifty dollars or upwards ;

**Not denouncing false claims.** If, in case of any person having to his knowledge or belief proved a false debt against his estate, he fail to disclose the same to his Assignee within one month after coming to the knowledge or belief thereof ;

**False schedule.** If, with intent to defraud, he wilfully and fraudulently omits from his schedule any effects or property whatsoever ;

**Withholding books, &c.** If, with intent to conceal the state of his affairs, or to defeat the object of this Act or of any part thereof, he conceals, or prevents, or withholds the production of any book, deed, paper or writing relating to his property, dealings or affairs ;

**Falsifying books.** If, with intent to conceal the state of his affairs or to defeat the object of the present Act or of any part thereof, he parts with, conceals, destroys, alters, mutilates or falsifies, or causes to be concealed, destroyed, altered, mutilated or falsified, any book, paper, writing or security or document relating to his property, trade dealings or affairs, or makes or is privy to the making of any false or fraudulent entry or statement in or omission from any book, paper, document or writing relating thereto ;

**Stating fictitious losses.** If, at his examination at any time, or at any meeting of his creditors held under this Act, he attempts to account for the non-production or absence, any of his property by fictitious losses or expenses :

If, within the three months next preceding the demand SEC. 140. of assignment or the issue of a writ of attachment in <sup>Disposing of goods not paid for.</sup> liquidation, he pawns, pledges, or disposes of, otherwise than in the ordinary way of his trade, any property, goods or effects, the price of which remains unpaid by him during such three months.

When a bankrupt had in his schedule inserted a party as a creditor at whose suit he was then detained in custody, and it appeared that such party was not a creditor in any shape, Held: that this was a making of a fraudulent entry in a document with intent to defraud his creditors, (*re Button*, 33 L. T. Rep. 95). It would seem that obtaining goods upon credit and selling or pledging them immediately does not constitute an offence unless, *from* attendant circumstances, fraud can be inferred. A loss resulting to the estate from the transaction makes no difference, (*ex parte Manico*, 3 D. M. & G. 502; s. c. D. M. & G. B. A. 270). The language, however, of the last clause of this section seems wide enough to cover such a case, though the words "otherwise than in the ordinary way of his trade" are likely to prove an obstacle in the way of a conviction.

Upon an indictment against a bankrupt, an allegation that at the time of his examination under the bankruptcy, he was possessed of certain real estate, and charging that at the time of his examination he feloniously did not discover when he disposed of such estate with intent to defraud his creditors, was held bad in arrest of judgment for not containing an averment that the bankrupt had in fact disposed of the estate, (*Regina v. Harris*, 19 L. J. 11 M. C.).

**141.** Every offence punishable under this Act shall be tried as other offences of the same degree are triable in the Province where such offences are committed.

The corresponding section of the Act of 1869 provided that such offences should be tried by a special jury, but omitted to provide the method for summoning and empanelling such a jury. This omission resulted in at least two notable failures of justice in Montreal alone.

**142.** If any creditor of an Insolvent, directly or indirectly, takes or receives from such Insolvent, any payment, gift, gratuity or preference, or any promise of payment, gift, gratuity or preference, as a consideration or inducement to consent to the discharge of such Insolvent or to execute a deed of composition and discharge with him; or if any creditor knowingly ranks upon the estate of the Insolvent for a sum of money not

Creditors taking consideration for granting discharge, &c.

**SEC. 142.** due to him by the Insolvent, or by his estate, such creditor shall forfeit and pay a sum equal to treble the value of the payment, gift, gratuity or preference so taken, received or promised, or treble the amount improperly ranked for as the case may be, and the same shall be recoverable by the Assignee for the benefit of the estate, by suit in any competent court, and when recovered, shall be distributed as part of the ordinary assets of the estate.

**Penalty.**

Punishment of insolvent receiving money, &c., and not handing the same to assignee.

**143.** If, after a demand is made for the issue of a writ of attachment in insolvency, or for an assignment of his estate under this Act, as the case may be, when such demand shall be followed by the issue of a writ of attachment or by an assignment under this Act, the Insolvent retains or receives any portion of his estate or effects, or of his moneys, securities for money, business papers, documents, books of account, or evidences of debt, or any sum or sums of money, belonging or due to him, and retains and withholds from his Assignee, without lawful right, such portion of his estate or effects, or of his moneys, securities for money, business papers, documents, books of account, evidences of debt, sum or sums of money, the Assignee may make application to the judge by summary petition, and after due notice to the Insolvent, for an order for the delivery over to him of the effects, documents, or moneys so retained ; and in default of such delivery in conformity with any order to be made by the judge upon such application, such Insolvent may be imprisoned in the common gaol for such time, not exceeding one year, as such judge may order.

Imprisonment for disobeying order.

An insolvent received a sum of money during the interval between date of notice of meeting of creditors and the appointment of an assignee, and refused to pay it to the assignee, that this was " retaining and withholding without lawful right," within the meaning of the Act, (*in re Warmington, & Jones*, assignee, 12 L. C. Jur. 237).

Certain documents to be evidence.

**144.** The deeds of assignment and of transfer, or in the Province of Quebec authentic copies thereof, or a duly authenticated copy of the record of the appointment of the Assignee certified by the clerk or prothono-

tary of the court in which such record is deposited, under SEC. 144. the seal of such court, shall be *prima facie* evidence in all courts, whether civil or criminal, of such appointment, and of the regularity of all proceedings at the time thereof and antecedent thereto.

#### BUILDING AND JURY FUND.

**145.** One per centum upon all moneys proceeding from the sale by an Assignee, under the provisions of this Act, of any immovable property in the Province of Quebec, shall be retained by the Assignee out of such moneys, and shall, by such Assignee, be paid over to the sheriff of the district, or of either of the Counties of Gaspé or Bonaventure, as the case may be, within which the immovable property sold shall be situate, to form part of the Building and Jury Fund of such district or county.

**146.** The Governor in Council shall have all the powers with respect to imposing a tax or duty upon proceedings under this Act, which are conferred upon the Governor in Council by the thirty-second and thirty-third sections of the one hundred and ninth chapter of the Consolidated Statutes for Lower Canada, and by the Act intituled : *An Act to make provision for the erection or repair of Court Houses and Gaols at certain places in Lower Canada*, (12 Vict., chap. 112).

#### PROCEDURE IN THE CASE OF INCORPORATED COMPANIES.

**147.** The provisions of this Act shall apply to the estates of incorporated companies, not especially excepted in the first section of this Act, subject to the following modifications :—

(1.) No writ of attachment shall issue against the estate of an incorporated company except upon the order of the judge, and after notice of at least forty-eight hours has been given to such company of the application for such writ. The judge in all cases where proceedings have been adopted under this Act against an incorporated company, may, before granting a writ of attachment, order the Official Assignee to inquire into the affairs of

**SEC. 147.** the company, and to report thereon within a period not exceeding ten days from the date of such order :

**Joint-stock companies.**  
**Company to exhibit books, &c.**

(2.) Upon such order it shall be the duty of such company, and of the president, directors, managers and employees thereof, and of every other person having possession or knowledge thereof, to exhibit to the Official Assignee, or to his Deputy, the books of account together with all inventories, papers, and vouchers referring to the business of the company, or of any other person ; and generally to give all such information as may be required by the Official Assignee to form a just estimate of the affairs of the said company ; and any refusal on the part of the said president, directors, managers or employees of the company to give such information shall, on evidence of such refusal, be considered as a contempt of an order of the court or judge, and punishable by fine or imprisonment or by both at the discretion of the judge :

**After service of order, company to hold property in trust.**

(3.) From the time the above order is served upon the company, the president, directors, managers and employees thereof, and all other persons having the control or possession of its affairs or property, shall hold the estate and property of the said company upon trust for the creditors of the said company, and shall be bound to account for all the property of the said company under the same obligations, liabilities, and responsibilities as trustees appointed by courts of law or equity in the several Provinces, or as guardians and sequestrators in the Province of Quebec are bound :

**Meeting of creditors may be called.**

(4.) Upon the report of the Official Assignee or before any order is given for the examination into the affairs of the company, as herein provided, the judge may order that a meeting of the creditors be called and held in the manner provided for by this Act for the first meeting of creditors, at which meeting the creditors present, who shall verify their claims under oath, may pass such resolutions either for the winding up of the affairs of the company or for allowing the business thereof to be carried on as they may deem most advan-

**Resolutions thereof.**

tageous to the creditors; and may also appoint two SEC. 147. Inspectors and indicate the mode in which the business <sup>Joint-stock companies.</sup> of the company should be wound up or should be continued :

(5.) The resolutions so adopted shall be submitted to the judge at the time and place appointed at the meeting, and at least forty-eight hours notice shall be given by the Official Assignee to the company of the time and place so fixed :

(6.) The judge, after hearing such creditors as may be present, the Assignee and the company, may confirm, reject, or modify the said resolutions ; and he may order the immediate issue of a writ of attachment to attach the estate of the company, or direct that the issue of such writ shall be suspended for a period not exceeding six months,—during which period he may order that the Official Assignee or the Inspectors (if any have been appointed by the creditors) shall exercise a general supervision over the estate and business of the said company by requiring from the president, directors, managers and employees of the company, such periodical accounts and statements of the business done and of the moneys received and expended or disbursed since the last statement as may be required by the said Inspectors or the said Official Assignee to obtain a proper knowledge of the affairs of the company :

(7.) The judge may also, if he deems it for the advantage of the creditors, appoint a Receiver charged with such duties as to the superintendence or management of the affairs of the company as may be imposed upon him by the order of the judge ; and who shall also assume and be invested with all the powers vested in the directors and stockholders respecting the calling in and collecting of the unpaid stock of the company, and subject to such orders and directions as he may, from time to time, receive from the judge :

(8.) Such Receiver shall account, whenever ordered by the court or judge, for all moneys or property he may have received from the estate:

**SEC. 147.** (9.) Before the expiration of the six months next after such order, the Official Assignee or the Receiver, as the case may be, shall cause another meeting of the creditors to be called:

**Joint-stock companies.** Further meeting within six months.  
**Further delay may be granted.**

(10.) On the resolutions adopted at such meeting the judge may either grant a further delay not exceeding six months, or cause a writ of attachment to issue at the instance of any creditor or creditors.

**If demands are unsatisfied estate of company may be wound up.**

(11.) If, at the expiration of such prolonged delay, the demands made upon the company to place it in liquidation have not been satisfied, the judge shall order the issue of a writ of attachment: and the estate of the said company shall be wound up under the provisions of this Act, unless the creditor or creditors entitled to such writ shall consent to a further delay.

**Judge may modify orders.**

(12.) Nothing in this section shall prevent the judge, before the expiration of the delays he may have granted under the preceding sub-sections, from cancelling the orders so given by him, and from ordering the issue of a writ of attachment or from releasing the company from the effect of any such order, as circumstances may require:

**Officers of company may be examined.**

(13.) The president, directors, managers or other officers or employees of the company, and any other person, may be examined by the Assignee or by the judge on the affairs of the company, and each of them shall, for refusal to answer questions put in reference to the business within his own cognizance, be liable to the same penalties as ordinary traders refusing to answer questions put under the provisions of this Act:

**Remuneration of assignee and receiver.**

(14.) The remuneration of the Official Assignee and of the Receiver for services performed under the preceding sub-sections shall be fixed by the judge.

**Company may make an assignment pending delay.**

(15.) Nothing in the preceding sub-sections shall prevent the president, directors, managers or employees of the company, on being duly authorized to that effect, from making an assignment of the estate of such company to an Official Assignee in the form provided for by this Act, before the expiration of the delays which may have been granted to such company by the court or judge.

## GENERAL PROVISIONS.

**148.** The foregoing provisions of this Act shall come **SEC. 148.** into force and take effect upon, from and after the first day of September, in the present year, 1875, and not before, except in so far as relates to the appointment of Official Assignees, and the making and framing of rules, orders and forms, to be followed and observed in proceedings under this Act, with respect to which the said provisions shall be in force from the time of the passing of this Act.

**149.** "The Insolvent Act of 1864," and the Act to amend the same passed by the Parliament of the late Province of Canada in the twenty-ninth year of Her Majesty's Reign, "The Insolvent Act of 1869," the Act amending the same passed in the thirty-third year of Her Majesty's reign, and the Act amending the same passed in the thirty-fourth year of Her Majesty's Reign, and the Act passed in the thirty-seventh year of Her Majesty's reign, continuing the same, the Act passed by the legislature of Prince Edward Island in the thirty-first year of Her Majesty's reign, chaptered fifteen, intituled:—"An Act for the relief of unfortunate debtors," and the several Acts amending and continuing the same which are in force in the said Province of Prince Edward Island, which are mentioned in and continued by the last mentioned Act passed in the thirty-seventh year of Her Majesty's reign, the Act of the legislature of the Colony of Vancouver Island, passed in the year 1862, and intituled:—"An Act to declare the law relative to Bankruptcy and Insolvency in Vancouver Island and its dependencies," and the Act of the legislature of the Colony of British Columbia, passed in the year 1865, and intituled:—"An Ordinance to amend the law relative to Bankruptcy and Insolvency in British Columbia," and all Acts of the said legislatures, or either of them, amending the same, are hereby continued in force to the first day of September in the present year 1875, after which date the same shall be repealed, except so far as regards pro-

**SEC. 149.** Proceedings commenced and then pending thereunder, and also as regards all contracts, acts, matters and things made and done before such repeal, to which the said

**Former insolvent acts.**

Acts or any of the provisions thereof would have applied if not so repealed, and especially such as are contrary to the provisions of the said Acts, having reference to fraud and fraudulent preferences, and to the enregistration of marriage contracts within the Province of Quebec ; and as to all such contracts, acts, matters and things, the provisions of the said Acts shall remain in force, and shall be acted upon as if this Act had never been passed : Provided always, that as respects matters of procedure merely, the provisions of this Act shall, upon and after the said first day of September, in the present year, 1875, supersede those of the said Acts even in cases commenced and then pending, except cases pending before any Official Assignee, in his judicial capacity : And all securities given under the said Acts shall remain valid, and may be enforced, in respect of all matters and things falling within their terms, whether on, before or after the day last aforesaid ; and especially all securities theretofore given by Official Assignees shall serve and avail hereafter as if given under this Act. All other Acts and parts of Acts now in force in any of the Provinces to which this Act applies, which are inconsistent with the provisions of this Act, are hereby repealed.

**Inconsistent acts repealed.**

Held, that the Act of 1869 regulates the procedure, after its passage, in Insolvency proceedings commenced under the Act of 1864, and consequently that the discharge of an insolvent, who had made an assignment under the Act of 1864, intituled : "The Insolvent Act, 1869," was valid, (*Carnegie v. Tuer*, 6 P. R. 165 ; C. L. Chamb. Dalton, C. C. & P. ; Rob. & J. Dig. 453.)

**Act to apply to all the provinces of Canada.**

**150.** The foregoing provisions of this Act shall apply to each and every the Provinces in the Dominion of Canada.

**Certain provisions of 32-38 Vict., c. 16, to apply to Manitoba until 1st September, 1875.**

**151.** The provisions of "*The Insolvent Act of 1869*," applied by Schedule A of the Act thirty-fourth Victoria, chapter thirteen, to Insolvencies resident in the Province of Manitoba, shall continue to apply to such Insolvencies, in

the case of composition and discharge mentioned in the SEC. 152. said provisions, until the said first day of September, 1875, until which day the said provisions are hereby continued in force for that purpose, and upon, from and after the said day the same shall be repealed, subject to the like exceptions and provisions as are made in the next preceding section but one, as to the Acts and laws repealed by the said section; and in the provisions so continued in force "The Court" shall mean the Court of <sup>"Court"</sup> and Queen's Bench of Manitoba, and "The Judge" shall <sup>"judge"</sup> mean the Chief Justice or one of the Puisné Judges of the said Court.

**152.** This Act shall be known and may be cited as <sup>short title.</sup>  
*"The Insolvent Act of 1875."*

# RULES OF PRACTICE AND TARIFFS OF FEES IN THE PROVINCE OF QUEBEC.

*Rules and Orders and Tariff of Fees made by the Judges of the Superior Court for Lower Canada, under and by virtue of the Statute 27 and 28 Vict., cap. 17, intituled: "An Act respecting Insolvency."*

See sections 122 and 124 of the Insolvent Act of 1875, p. 164-5 ante.

1. There shall be assigned in the court house of each judicial <sup>Rooms to be set apart.</sup> district at which the sittings of the superior court are held, two rooms for matters in insolvency, one in which the sittings of the judge shall be held, and the other for the office of the clerk in insolvency.
2. All judicial proceedings in insolvency shall be had and conducted in the said court room alone, and not elsewhere; and the sittings of the judge shall commence at 11 A. M., or at such hour as the judges or judge in each district shall hereafter appoint, and shall continue till the business of the day shall be completed, or until the judge shall adjourn the same.
3. The clerk's office shall be kept open every juridical day, from 9 A. M. to 4 P. M., and shall be attended during that time by a clerk appointed by the district prothonotary, and who shall be known as "The Clerk in Insolvency."
4. To ensure regularity of proceedings at the sittings of the judges, the business shall be conducted in the following order :
  1. Meetings of creditors ;
  2. Motions ;
  3. Rules *nisi* ;
  4. Petitions, except as hereinafter mentioned ;
  5. Proceedings on applications for discharge of insolvents ;
  6. Proceedings on applications for discharge of assignee ;
  7. Appeals.
5. Proceedings before a judge or court may be conducted by the <sup>Who may conduct proceedings.</sup> insolvent himself, or by any party having interest therein, or by their attorney *ad litem*, admitted to practice in Lower Canada, and by no other person.

6. All motions, petitions and claims, and all papers in the nature <sup>form of papers.</sup> of pleadings in insolvency shall be intituled: "In Insolvency for the District of..... In the matter of..... Insolvent, and . . Claimant, Petitioner or Applicant," as the case may be, plainly written, without interlineations or abbreviations of words; and the subject or purpose thereof shall be plainly and concisely stated. They shall also be subscribed by the petitioner, applicant or claimant, or by his attorney *ad litem* for him. And they shall be subject to the ordinary rules of procedure of the superior court in respect of similar papers, as regards the names and designations of the parties, and the mode in which they shall be docketed and filed.

7. No paper of any description shall be received or filed in any <sup>Papers to be</sup> case, unless the same shall be properly numbered and intituled in <sup>endorsed.</sup> the case or proceeding to which it may refer or belong; and be also endorsed with the general description thereof, and with the name of the party or his Attorney *ad litem* filing the same.

8. In all appealable matter in dispute, the pretensions of the <sup>Proceedings to be in writing.</sup> parties shall be set forth in writing, in a clear, precise and intelligible manner, and the notes of the verbal evidence taken before the assignee shall be plainly written, shall be signed by the witness, if he can write and sign his name, and shall be certified by the assignee, as having been sworn before him. And in the event of an appeal, the Assignee shall make and certify a transcript from his register of the proceedings before him in the manner appealed from. And he shall also make and certify a list of the documents composing such proceedings and appertaining thereto, and shall annex such transcript and list to such documents with a strong paper or parchment cover, before producing the record before the judge, as required by the said act.

9. All proceedings before a judge or court shall be entered daily, <sup>Dockets to be</sup> in order of date, in a docket of proceedings, to be kept by the clerk <sup>kept.</sup> for each case; and shall from time to time, and until the close of the estate, be fairly transcribed in registers suitable therefor, which shall be kept and preserved by the prothonotary, in the same manner as the registers of proceedings of the superior court.

10. No demand, petition or application of which notice is required <sup>Notice of proceedings to be given.</sup> to be given, either by the provisions of the said act or by an order of the judge or court, shall be heard until after such notice shall have been given, and due return thereof made and filed in the case.

11. Except where otherwise limited and provided by the said act <sup>Delay for proceedings may be enlarged.</sup> and upon good cause shewn, the time for proceeding after notice

thereof has been given, may be enlarged by the judge or court whenever the rights of parties interested may seem to require it for the purposes of justice.

**Computation of delays.** 12. Whenever a particular number of days is prescribed for the doing of an act in insolvency, the first and last day shall not be computed nor any fractions of a day allowed; and when the last day shall fall upon a Sunday or holiday, the time shall be enlarged to the next juridical day.

**Affidavits.** 13. All affidavits of indebtedness made by a creditor or by the clerk or agent of a creditor, shall set forth the particulars and nature of the debt, with the same degree of certainty and precision as is required in affidavits to hold to bail in civil process in the courts of Lower Canada.

**Writs of attachment.** 14. All writs of attachment issued under the said act, shall, as issued, be numbered and entered successively by the clerk in a book, to which there shall be an index, and to which access for examination or extract shall be had *gratis*, at all times during office hours.

15. Every such writ shall describe the parties thereto, in the same manner as they are described in the said affidavits of debt; and the declaration accompanying the said writ shall be similar in its form to the declarations required to be filed in ordinary suits in the superior court.

16. No such writ shall issue until after the affidavit of debt upon which the writ is founded, shall have been duly filed in the clerk's office.

**Service of papers by bailiff or other literate person.** 17. All services of writs, rules, notices, warrants and proceedings in Lower Canada, except otherwise specially prescribed by the said Act, may be made by a bailiff of the superior or circuit Court, whose certificates of service shall be in the form required for service of process in the said courts; or by any literate person, who shall certify his service by his affidavit; and in either case, the manner, place and time of such service shall be described in words, and also the distance from the place of service to the place of proceeding.

18. All services of writs, rules, notices, warrants or other proceedings, shall be made between the hours of 8 A. M. and 7 P. M., unless otherwise directed by a Judge or Court upon good cause shewn.

**Return of writs.** 19. Writs of attachment need not be called in open court, but shall be returned on the return day into the clerk's office, and shall be there filed for proceedings thereon, as may be advised or directed.

20. Every day, except Sundays and holidays, shall be a juridical day for the return of said writs, and for judicial and court proceedings.

21. The sheriff to whom the writ of attachment shall be directed shall not be required to make any detailed inventory or *procès verbal* of the effects or articles by him attached under such writ; but a full and complete Inventory of the Insolvent's estate, so attached by the sheriff, shall be made by the assignee or person who shall be placed in possession thereof as guardian under such writ; by sorting and numbering the books of account, papers, documents and vouchers of the estate, and entering the same, with the other assets and effects thereof, in detail, in a book for the same, which shall be called "The Inventory of the Estate of..... . . . . .," and which shall be filed by the said assignee or person in possession, on the return day of the said writ, as required by the said act; and the said inventory shall be open for examination or extract at all times during office hours, *gratis*. Sheriff need not make in ventory  
But assignee must.

22. Immediately upon the execution of the voluntary deed or instrument of assignment to the assignee, he shall give notice thereof by advertisement in the form D of the said act, requiring, by such notice, all creditors of the insolvent to produce before him, within two months from the date thereof, their claims, specifying the security therefor, with the vouchers in support of such claims, as required by such notice. Notice of as signment.

23. The clerk shall prepare for the judge or court, a list of matters List of pending, or ready and fixed for proceeding on each day, following *ing proceed ings*. therein the order of procedure prescribed by the 4th rule, which list shall be communicated to the judge on the previous day.

24. The record of proceedings in each case shall at all times during office hours, be accessible, at the clerk's office, to creditors and others in interest in such cases, for examination or extract therefrom, *gratis*. And in like manner the minutes of meetings of creditors, and the registers of proceedings, together with the claims made and the documents in possession of the assignee, shall also be accessible to creditors and others in interest in the case, at convenient hours, daily, to be appointed by the said assignee.

25. The Assignee shall, from time to time, under order of date, and within twenty-four hours after the proceedings had before him, file Assignee to file record of pro ceedings. in the said clerk's office, a clear copy under his signature as such assignee, of such proceedings, together with a copy of the several newspapers and official gazette, in which he shall have caused notices of such proceedings to be advertised, which said copy and newspapers shall form part of the record of proceedings of the particular case.

Returns of  
moneys in  
assignee's  
hands.

26. The assignee shall, on the third juridical day of each month, after he shall have commenced to deposit estate moneys in a bank or bank agency, as required by the said act, file of record in the case an account of the estate, shewing the balance thereof in his hands, or under his control, made up to the last day of the preceding month. And no moneys so deposited shall be withdrawn without a special order of the court, entered in the docket of proceedings in the case, or upon a dividend sheet prepared and notified, as required by the said Act, or unless otherwise ordered by the creditors, under the powers conferred upon them by the said act.

## TARIFF OF FEES IN INSOLVENCY, FOR THE PRO- VINCE OF QUEBEC.

### IN PROCEEDINGS FOR COMPULSORY LIQUIDATION,

#### ON BEHALF OF THE PLAINTIFFS,

*If not contested:*

	\$ cts.
To the prothonotary for writ of attachment, .....	1 80
Do.           copy of writ,.....	0 30
Sheriff for warrant,.....	2 50
Copies of warrant, each.....	0 50
All proceedings by the sheriff or his agent or messenger in the seizure and return, exclusive of mileage,.....	2 00
Guardian, per day,.....	1 00
Do.           making up inventory and statements, to be subject to taxation by the judge :	
To the prothonotary on return of writ,.....	5 00
Crier's fee on return,.. ..	0 80
To the prothonotary for copy of order for meeting,.....	0 50
To the prothonotary for meeting,.....	1 00
To the prothonotary for each copy of judgment appointing official assignee,.....	0 50
Attorney's fee for conducting proceedings to appointment of official assignee, .....	30 00

*If contested, additional fees :*

To the prothonotary on inscription,.....	2 00
To the prothonotary on every witness examined for plaintiff, exceeding two in number,.....	0 30

\$ cts.

And for each subsequent deposition exceeding 400 words in length, for every 100 words,.....	0 10
Attorney's fee, additional,.....	20 00
Counsel fee at enquête,.....	10 00

ON BEHALF OF THE DEFENDANTS,

*If not contested :*

Attorney's fee for appearance,.....	10 00
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*If contested additional fees :*

To the prothonotary on filing petition in contestation, .....	6 00
On every witness examined for defendant, not exceeding two in number, .....	/ 0 30
And for each subsequent deposition exceeding 400 words in length, for every 100 words,.....	0 10
Attorney's fee, additional,.....	20 00
Counsel fee at enquête, .....	10 00

ON VOLUNTARY ASSIGNMENTS.

To the prothonotary for filing and entering deed,.....	2 00
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ON PETITIONS, OTHER THAN PETITIONS IN APPEAL, IN CONTESTATION OF PROCEEDINGS FOR COMPULSORY LIQUIDATION, OR FOR EXAMINATION OF DEBTOR:

To the petitioner's attorney on every petition, not contested,...	5 00
If contested, without enquête,.....	10 00
If contested, with enquête,.....	15 00
To the respondent's attorney—	
If contested, without enquête,.....	8 00
If contested, with enquête,.....	12 00
To the prothonotary—	
Filing petitions,.....	2 00
Copy of order,.....	0 50
If contested on filing contestation,.....	2 00
If there be an enquête, for every deposition,.....	0 30
For all words over 400 in any deposition, per 100,.....	0 10

ON PETITIONS IN APPEAL TO A JUDGE:

To the assignee for transcript of record and making up record and attendance before the judge, .....	5 00
--	------

**To the prothonotary—**

	\$ cts.
Filing petition,.....	0 20
Remission of record, .....	1 00
<b>To the attorney for the petitioner—</b>	
If not contested,.....	10 00
If contested,.....	20 00
<b>To the attorney for the respondent, .....</b>	<b>15 00</b>

**ON PETITIONS FOR ORDER FOR EXAMINATION OF  
DEBTOR OR FOR OTHER PERSONS RESPECT-  
ING THE ESTATE AND EFFECTS OF THE  
INSOLVENT :**

To the petitioner's attorney, .....	2 50
To the prothonotary, for order to serve,.....	0 50

**ON CLAIMS.****To the attorneys—**

For every chirographic claim, without security,.....	1 00
For every chirographic claim, with security,.....	2 00
For every hypothecary claim, if not contested,.....	5 00

**To the assignee—**

On every chirographic claim and hypothecary claim, not contested,.....	0 10
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**ON CONTESTATION OF CLAIM.***Without Enquête:*

To claimant's attorney, .....	10 00
To contestant's attorney, .....	10 00

*With Enquête, additional.*

To claimant's attorney, .....	20 00
To contestant's attorney, .....	20 00
To the assignee—	

For every witness examined on the contestation of a claim, .....	0 25
On inscription of contestation for argument.....	2 00

**ON CONTESTATION OF DIVIDEND SHEETS.**

The same fees and disbursements to counsel and to  
assignee as on contestation of claim.

**DISCHARGES.**

**ON APPLICATION FOR DISCHARGE** by the court, for confirmation  
of discharge, or for annulling discharge:

To the applicant's attorney—	
If not contested, .....	15 00

	\$ cts.
If contested, without enquête, .....	25 00
If contested, with enquête, .....	35 00
To the respondent's attorney—	
If contested, without enquête, .....	15 00
If contested, with enquête, .....	25 00
To the prothonotary—	
Filing application,.....	2 00
Every deposition,.....	0 30
All words over 400 in each deposition, per 100,.....	0 10

#### MISCELLANEOUS.

To the attorneys, prothonotaries and bailiffs, fees and disbursements on all rules, motions, copies of rules, judgments, and orders, commissions *rogatoires*, and other incidental matters according to the same rates as are allowed by the present tariff in first class actions in the superior court.

All necessary disbursements for advertisements and notices.

#### IN ONTARIO.

*General Order of December, 1864, and Tariff of Fees for Insolvency Proceedings in Upper Canada. Promulgated by the Judges of the Superior Courts of Common Law, and of the Court of Chancery, under 27 and 28 Victoria, c. 17.*

See sections 123 and 124 of Insolvent Act of 1875, p. 164. *ante.*

WHEREAS it is provided by the Insolvent Act of 1864, amongst other things, that the judges of the superior courts of common law, and of the court of chancery in Upper Canada, or any of them, of whom the chief justice of Upper Canada, or the chancellor, or the chief justice of the common pleas, shall be one, shall have power to fix and settle the costs, fees and charges which shall be had, taken or paid, in all cases and proceedings under the said act, by or to attorneys, solicitors, counsel, officers of courts, whether for the officers or for the crown, as a fee for the fee fund, or otherwise, sheriffs, assignees, or other persons, whom it may be necessary to provide for;

And whereas the Chief Justice of Upper Canada, and the judges of the superior courts of common law and equity, at Toronto, have assumed the duty so imposed upon them;

In pursuance, therefore, of the power so contained in the Insolvent Act of 1864, the following table of costs has been framed by the

Chief Justice [and judges, and it is hereby declared, determined, and adjudged, that all and singular the costs and fees mentioned in the said table, and no other or greater, shall be allowed on taxation, or taken or received, by any counsel or attorney, sheriff or officer, respectively, for any services rendered under the said Insolvent act of 1864.

TORONTO, December 19, 1864.

TARIFF.

*Fees to Solicitor or Attorney, as between party and party, and also as between Solicitor and Client.*

	\$ cts
Instructions for voluntary assignment by debtor, or for compulsory liquidation, or for petition, where the statute expressly requires a petition, or for brief, where matter is required to be argued by counsel, or is authorised by the judge to be argued by counsel, or for deeds, declarations, or proceedings on appeal.....	2 00
Drawing and engrossing petitions, deeds, affidavits, notices, advertisements, declarations, and all other necessary documents or papers when not otherwise expressly provided for, per folio of 100 words, or under.....	0 20
Making other copies when required.....	0 10
When more than five copies are required of any notice or other paper, five only to be charged for, unless the notice or paper is printed, and in that case printer's bill to be allowed in lieu of copies, drawing schedule, list, or notice of liabilities, per folio, when the number of creditors does not exceed twenty.....	0 20
When the number of creditors therein exceeds twenty, then for every folio of 100 words over twenty.....	0 10
Every common affidavit of service of papers, including attendance.....	0 50
Every common attendance .....	0 50
Every special attendance on judge.....	2 00
For every hour after the first.....	1 00
(To be increased by the judge in his discretion.)	
Every special attendance at meetings of creditors, or before assignee, acting as arbitrator.....	1 00
Fee on writ of attachment against estate and effects of insolvent, including attendance.....	2 00

	\$ cts.
Fees on rule of court or order of Judge.....	1 00
Fee on <i>sub ad test.</i> , including attendances.....	1 00
Fee on <i>sub duces tecum</i> , including attendance.....	1 25
And, if above 4 folios, then for each additional folio, over such 4 folios.....	0 10
Fee on every other writ.....	1 00
Every necessary letter.....	0 50
Costs of preparing claim of creditors, and procuring same to be sworn to, and allowed at meeting of creditors, in ordinary case, where no dispute.....	1 00
Costs of solicitor of petitioning creditor, for examining claims filled up to appointment of assignee, for each claim so examined.....	0 50
Cost of assignee's solicitor for examining each claim required by assignee to be examined.....	0 50
Preparing for publication advertisements required by the statute, including copies and all attendances in relation thereto.....	1 00
Preparing, engrossing, and procuring execution of bonds or other instruments of security.....	2 00
Mileage for the distance actually and necessarily travelled, per mile .....	0 10
Bill of costs; engrossing, including copy for taxation, per folio	0 20
Copy for the opposite party .....	0 50
Taxation of costs .....	0 50

No allowance to be made for unnecessary documents or papers, or for unnecessary matter in necessary documents or papers, or for unnecessary length of proceedings of any kind. In case of any proceedings not provided for by this tariff, the charges to be the same as for like proceedings, as in the tariffs of the superior courts.

#### COUNSEL.

Fee on arguments, examinations, and advising proceedings, to be allowed and fixed by the judge as shall appear to him proper under the circumstances of the case.

#### FEE FUND.

	\$ cts
Every warrant issued against estate and effects of Insolvent debtors.....	1 00
Every other warrant or writ.....	0 30
Every summary rule, order or fiat.....	0 30

	\$ cts.
Every meeting of creditors before judge.....	0 50
If more than an hour.....	1 00
If more than one on same day, \$2.00 to be apportioned amongst all.	
Every affidavit administered before judge.....	0 20
Every certificate of proceedings by judge of county court for transmission to a superior court or judge thereof.....	0 50
Every bankrupt's certificate.....	1 00
Every taxation of costs.....	0 15

## FEES TO CLERK.

	\$ cts
Every writ, or rule, or order.....	0 50
Filing every affidavit or proceeding.....	0 10
Swearing affidavit.....	0 20
Copies of all proceedings of which copy bespoken or required, per folio of 100 words.....	0 10
Every certificate.....	0 30
Taxing costs.....	0 50
Taxing costs and giving allocatur.....	0 65
For every sitting under commission, per day.....	1 00
If more than one on same day, \$2.00 to be apportioned amongst all.	
Fee for keeping record of proceedings in each case.....	1 00
For any list of debtors proved at first meeting, (if made). ....	0 50
For any list of debtors at second meeting.....	0 50
Any search.....	0 20
A general search relating to one bankruptcy, or the bankruptcy of one person or firm.....	0 50

## SHERIFF.

Same as on corresponding proceedings in superior courts.

## WITNESSES.

Same as in superior courts.

## RULES OF PRACTICE, NOVA SCOTIA.

No special rules of practice in Insolvency, have been laid down by the Judges in Nova Scotia.

**TARIFF OF FEES IN INSOLVENCY IN THE PROVINCE  
OF NOVA SCOTIA.**

**INSOLVENT ACT, 1869.**

It is ordered, under and by virtue of the 32 and 33 Vic., c. 16, intituled: "An Act respecting Insolvency," sec. 139, that until further direction therein, the same costs, fees, and charges, shall or may be had, taken, or paid by and to Judges of Probate, Counsel, Attorneys, Solicitors, and Sheriffs, as are now payable to and taken by them in the Supreme Court and Court of Probate in this Province, under and by virtue of the Acts in that behalf.

HALIFAX, 13th Sept., 1869.

(Signed,) . . . . .	W. YOUNG.
	J. W. JOHNSTON.
	W. F. DESBARRES.
	L. M. WILKINS.

I, JAMES WALTON NUTTING, of the city of Halifax, in the province of Nova Scotia, prothonotary in and for the county of Halifax, of the supreme court of said province, do hereby certify that the foregoing paper writing, headed "Insolvent Act, 1869," contains a true copy of an order made by the chief justice and assistant judge of said court, whose names are thereunto subscribed, regulating the costs and fees to be charged in said province under said act.

(Signed)            J. W. NUTTING, Prothy.

HALIFAX, 29th October, A. D. 1869.

The fees of the Judge of Probate for his services in Insolvency were fixed by an order of the Judges of the Supreme Court in September, 1870, and are as follows:

	\$ cts.
Where the value of the insolvent estate does not exceed \$800, and the judge has been called upon therein. In full of all fees.....	6 00
In cases beyond that value.	
Every warrant or attachment including order therefor.....	1 00
Every order confirming or annulling discharge of Insolvent and the hearing thereon.....	5 00
Signing every other order.....	0 40

	\$ cts.
Administering every oath .....	0 20
Testimony taken by the judge in writing, per folio... ....	0 20
Attending every meeting of creditors..... ....	1 00
If more than one hour, for every subsequent hour..... ....	1 00
..... .... Not to exceed in any one day	5 00
Attending personal examination of insolvent..... ....	5 00
Every hearing under secs. 15 and 26 .....	5 00
Transmitting appeal with statement of decision .....	5 00
Examining and taxing costs..... ....	0 50

The fees allowed to registrars, proctors, advocates, &c., are the same as in the probate court. These will be found in full in the Revised Statutes of Nova Scotia, Fourth Series, pages 618, 619 and 620.

#### REGISTRARS' FEES.

	\$ cts.
Where the estate does not exceed \$400, in full of all fees .....	4 00
Over \$400-\$800 .....	6 00
For filing every paper .....	0 07
Probate of will and letters of administration and entry of order therefor, where estate is under \$800..... ....	3 50
Above \$800 and less than \$4000, and entry of order therefor..	9 50
Letters of guardianship or <i>ad colligend um</i> and entry of order..	2 00
Copy of will and probate, per folio..... ....	0 10
For preparing bond in all necessary cases..... ....	0 80
Preparing citation and seal..... ....	0 40
Each copy thereof..... ....	0 20
Preparing necessary affidavits, each .....	0 20
Filing every warrant and seal..... ....	0 50
Filing every certificate of license to sell real estate..... ....	1 00
For all copies of papers, per folio..... ....	0 10
For every certificate and <i>Dedemus potestatem</i> .....	1 00
For entry of every decree in registry book and of every order not specially provided for per folio..... ....	0 10
Every search or inspection of documents..... ....	0 20
Preparing subpoena and seal..... ....	0 40
Filing each ticket for the same..... ....	0 10
Filing every or <i>caveat</i> appeal..... ....	0 40
Preparing every execution, attachment, or other process not specially provided for, and entry of order therefor..... ....	0 40
Filing every decree..... ....	2 00
Every oath administered by him..... ....	0 20
Taxing costs..... ....	0 50

## PROCTOR AND ADVOCATE.

	\$cts.
Taking instructions for client to commence or defend proceedings in probate court.....	2 00
Preparing every petition .....	1 00
Preparing every allegation or other paper necessary to be prepared by him, including accounts, per folio.....	0 20
Every additional copy thereof, per folio.....	0 10
Every necessary attendance on judge.....	1 50
Every hearing or argument before the judge not less than two dollars and fifty cents, nor more than \$10, at the discretion of the judge.	
Serving every notice or other paper on each person.....	0 20

## SHERIFF OR OTHER MINISTERIAL OFFICER.

Serving citation or other process (subpoena excepted) on each person .....	0 50
Posting up the same in three public places directed by the judge.....	1 00
Serving subpoena on each person.....	0 20
Travelling fees, per mile .....	0 10

## APPRAISERS' FEES.

For appraising the estate of a deceased person not to exceed, for each day he shall be actually employed .....	2 00
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## TARIFF OF FEES IN NEW BRUNSWICK.

In pursuance of the power given by "The Insolvent Act of 1869," the following table of fees and charges has been fixed and settled by the chief justice and judges of the supreme court of New Brunswick, to be taken and paid in all cases and proceedings under the said act, by or to attorneys, solicitors, counsel, and officers of courts, for any services rendered under the said insolvent act, and no other or greater shall be allowed on taxation.

**FEES TO SOLICITOR OR ATTORNEY AS BETWEEN  
PARTY AND PARTY, AND ALSO AS BETWEEN  
ATTORNEY AND CLIENT.**

	\$ cts.
Instructions for voluntary assignment or compulsory liquidation, or for petition, or brief when matter is required to be argued by counsel, or for proceedings on appeal.....	\$2 00
Drawing and engrossing all proceedings, notices, &c., per folio,	0 20
Copies thereof when required or necessary.....	0 10
Every common attendance on judge.....	0 50
Every special attendance on judge.....	2 00
Every special attendance at meeting of creditors or before assignee.....	1 00
Fee on writ of attachment against insolvent, including attendance.....	2 00
Every rule of court or order of judge, including attendance..	1 00
Fee on every other writ.....	1 00
Every necessary letter.....	0 50
Costs of preparing claim of creditor, procuring the same to be sworn to and allowed at meeting of creditors, in ordinary cases where no dispute.....	1 00
Attorney of petitioning creditor, for examining claims filed up to appointment of assignee; for each claim.....	0 50
Assignee's attorney, examining each claim required by assignee to be examined.....	0 50
Preparing for publication advertisements required by Act, including copies and attendance in relation thereto.....	1 00
Preparing, engrossing and procuring execution of bonds or other securities.....	2 00
Mileage actually and necessarily travelled (if beyond the county in which the attorney resides) per mile.....	0 10
Bill of costs, engrossing, including copy for taxation, per folio.....	0 20
Copy for the opposite party.....	0 50
Attending taxation of costs.....	0 50
Copy of taxed costs to be filed with the clerk.....	0 50

No allowance made for unnecessary documents or papers, or unnecessary prolixity in the same. For all other necessary proceedings, not provided for in this scale of fees, the charges to be the same as for like proceedings in the supreme court.

\$ cts.

## TO THE CLERK OF THE COUNTY COURT.

Signing every writ, rule, or order.....	\$0 50
Filing and entering deed of assignment, record of appointment, or attachment.....	1 00
Filing every other paper.....	0 10
Reading every paper in court.....	0 10
Swearing affidavit or administering oath.....	0 20
Copy of all proceedings furnished, per folio of 100 words.....	0 10
Certificate under seal of the court.....	0 60
Every other necessary certificate.....	0 30
Every meeting of creditors held before the clerk.....	1 00
For keeping record of proceedings in each case.....	1 00
Every search.....	0 20
General search on one day relating to one case or firm.....	0 50
For taking minutes of evidence before the judge when required, ed, per folio.....	0 10
Copy of minute of evidence for supreme court or judge there- of on appeal, to be paid by appellant, per folio.....	0 10
For scheduling and filing all papers from assignee after dis- charge.....	1 50

For all other services not included in the above scale, to be allowed the same rates as are allowed for like services in the county courts of New Brunswick.

## COUNSEL.

Fees on argument and examinations before judge, to be allowed and fixed by the judge, as shall appear to him proper under the circumstances of the case, not exceeding twenty dollars.

## TO THE INTERIM ASSIGNEE, ASSIGNEE OR GUARDIAN.

Drawing affidavit, notice, advertisement, and all other necessary documents or papers, per folio.....	\$0 20
Making other copies when required, per folio.....	0 10
When more than five copies are required of any notices, five only to be charged for, unless the notice is printed, and in that case printer's bill to be allowed in lieu of copies.	
For every witness examined before him.....	0 25
Mileage for the distance actually and necessarily travelled per mile.....	0 10

For calling first meeting of creditors and attending thereat...	4 00
For attending meeting of creditors, other than first, and keeping minutes.....	3 00
Attending at clerk's office, and writing duplicate record, per folio.....	0 20
Guardian per day.....	1 00

**SHERIFF.**

The same fees as on corresponding proceedings in the supreme court.

**WITNESSES' FEES.**

The same fees as are allowed in the supreme court.

All postages and printers' bill to be added.

The foregoing fees and charges shall, in each and every case, be taxed by the judge, and together with the commission provided for by the act, shall constitute all charges to be made for any services rendered under the said act; and a copy of the bill of costs so taxed shall in all cases be filed with the clerk immediately after such taxation.

All papers relating to any insolvency after the discharge of the assignee, and the allowance or disallowance of the certificate to the insolvent, shall be filed with the clerk of the court, and kept among the records thereof.

A copy of this tariff of fees shall be kept at all times posted up in a conspicuous place in the offices of the clerks and assignees respectively.

W. J. RITCHIE.  
JOHN C. ALLEN.  
J. W. WELDON.  
CHARLES FISHER,  
A. R. WETMORE.

20th August, 1870.

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